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Toward a Theory of Prior Restraint: The Central Linkage

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I. THE INQUIRY

The doctrine of prior restraint embodies a temporal preference. Acts of expression that could be sanctioned by means of criminal punishment or a civil damage award may not be regulated "in advance." The factor of timing, however, cannot serve to distinguish methods of regulation as neatly as this statement would seem to imply. In addition to a retrospective impact relating to punishment or compensation, criminal prohibitions and civil liability rules are meant to have a prospective impact—to deter speakers from engaging in harmful acts of expression in the future. If impact on speech before the moment of its dissemination is not by itself a basis for distinguishing methods of speech regulation, what then is it that makes a law a prior restraint? And why are prior restraints disfavored at all?

Even after fifty years, *Near v. Minnesota*[1] remains the Supreme Court's most important opinion on this subject. *Near* invalidated as a prior restraint one unusual type of injunction designed to abate a newspaper as a public nuisance. Chief Justice Hughes's majority opinion analogized the Minnesota procedure at issue to the classic system of administrative licensing that, in Harry Kalven's words, "has come down to us through English history with a bad name."[2] The decision would be a

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1. 283 U.S. 697 (1931).

2. Kalven, *Foreword: Even When a Nation Is at War—*, 85 HARV. L. REV. 3, 31 (1971).

landmark had it accomplished nothing more than to import into modern first amendment doctrine the eighteenth century aversion to licensing.[3] But *Near* has had a broader impact. Chief Justice Hughes's forceful essay on the evils of prior restraint, combined with the Court's action invalidating an injunction, has had the effect of turning prior restraint into a functional rather than merely a technical or historical concept. The Court no longer asks whether a challenged procedure amounts to the equivalent of a licensing system, as the Minnesota nuisance-abatement scheme arguably did.[4] "Prior restraint" has taken on a broader, some would say incoherent, meaning.

The key to this expansion of meaning is the proposition that all, or at least most, injunctions are prior restraints. *Near* did not hold that flat out. The peculiar features of the Minnesota procedure were emphasized in the majority opinion.[5] Yet both the dissent in *Near* and the early commentators assumed that other less distinctive injunctions would thereafter be regarded as prior restraints subject to an unusually heavy burden of justification.[6] Moreover, several Supreme Court decisions since that time, typically citing *Near*, have treated various kinds of injunctions as prior restraints.[7] These cases may establish the principle that all injunctions are prior restraints. On the other hand, each Supreme Court decision that holds an injunction to be an unconstitutional prior restraint can also be explained on substantive grounds such as the vagueness or overbreadth of the prohibition,[8] the illegitimacy of the injunc-

3. *See, e.g.*, 4 W. BLACKSTONE, COMMENTARIES *152. The history of the struggle against licensing in the seventeenth and eighteenth centuries is reviewed briefly in Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 650-52 (1955), and at length in F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776 (1952).

4. *See* State *ex rel.* Olson v. Guilford, 174 Minn. 457, 462, 219 N.W. 770, 772 (1928), *rev'd sub nom.* Near v. Minnesota, 283 U.S. 697 (1931).

5. 283 U.S. 697, 709-13 (1931).

6. *Id.* at 735-38 (Butler, J., dissenting). *See, e.g.*, Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 378-81 (1941); Note, 31 COLUM. L. REV. 1148 (1931).

7. *See, e.g.*, Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (pretrial non-publication order); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (pretrial non-publication order); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

8. The injunction in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), prohibited the persons enjoined from passing out any literature whatsoever anywhere within the boundaries of a suburban community. *Id.* at 417-20. The restraint in *Near* itself, prohibiting the publishing of any "malicious, scandalous, and defamatory newspaper," would surely be invalidated under the modern vagueness doctrine, even if embodied in a criminal statute.

tion under the doctrine of separation of powers,[9] or the constitutional immunity of the speech activity in question from any sort of restraint, subsequent as well as prior.[10] Furthermore, *Pittsburgh Press Co. v. Human Relations Commission*,[11] one of the Court's most recent pronouncements on the subject, appears to reject the notion that injunctions as a class should be grouped together with licensing systems for special disfavored treatment under the first amendment. "The special vice of a prior restraint," said Justice Powell for the majority, "is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."[12] That vice is exhibited, Powell noted, only by certain types of injunctions such as overly broad prohibitions, restraints based on a high degree of speculation regarding the likely consequences of the expression in question, and temporary restraining orders.

Academicians as well are coming to feel increasingly uneasy about the proposition that the standard injunction against speech should be burdened with the same adverse presumption that stalks the classic system of administrative licensing. Owen Fiss has been the most forceful on this point,[13] but Stephen Barnett sounds a similar theme in his brief but insightful article on prior restraint.[14] Other commentators have criticized the undiscriminating nature of the presumption against prior restraint, and have urged instead a highly particularistic ap-

9. The pivotal opinions by Justices Stewart and White in New York Times Co. v. United States, 403 U.S. 713 (1971), refusing to permit the government to enjoin publication of the Pentagon Papers on the basis of inherent executive authority, are based on this ground. *Id.* at 727-40.

10. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 568-70 (1976), appeared to rely heavily on the doctrine of prior restraint in striking down a judge's pretrial order against publication by the press of evidence "strongly implicative" of the defendant's guilt. Other decisions, however, have fashioned the principle that even subsequent punishments may not be imposed for the publication of information of a comparably sensitive nature. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (criminal punishment for publishing the name of a juvenile offender); Landmark Communications, Inc. v. Virginia, 435 U.S 829 (1978) (criminal punishment for publishing truthful information regarding the confidential proceedings of a judicial conduct commission); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (civil damage award for broadcasting the name of a rape victim obtained from public records). These cases suggest that the prohibition against publication at issue in *Nebraska Press* would have been invalidated even had it been imposed by criminal statute rather than judicial order.

11. 413 U.S. 376 (1973).

12. *Id.* at 390.

13. *See* O. FISS, THE CIVIL RIGHTS INJUNCTION 69-74 (1978).

14. *See* Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977).

proach to the evaluation of regulatory procedures under the first amendment.[15]

In this essay I revisit the issue introduced by *Near*: should the injunction, as a general matter, be regarded as a particularly repressive method of regulating speech, akin to the historically disfavored administrative licensing system? The question is of importance in first amendment theory because the modern doctrine of prior restraint would be thrown into disarray should one of its two central props be removed. That denouement may be all to the good. Perhaps there has been too much reliance in recent times on the rhetoric of prior restraint as a substitute for more discriminating analysis.[16] Before the analogy between injunctions and licensing systems is rejected, however, a careful examination of its possible validity seems appropriate, particularly on so fitting an occasion as this fiftieth anniversary celebration of *Near v. Minnesota*.

I build my inquiry around a search for features that modern licensing systems and injunctions have in common that might warrant grouping them together for similar treatment in first amendment analysis. Necessarily, I assess whether the common features that might differentiate licensing systems and injunctions from the standard "subsequent" punishments—criminal prohibitions and civil liability rules—are significant enough to warrant a special first amendment preference for the latter forms of speech regulation. One could, of course, imagine an argument against anti-speech injunctions that proceeds independently of the argument against licensing systems; the "common features" approach is not a logical imperative. Nevertheless, the historic rejection of licensing and the prestige of the *Near* decision are important symbols in contemporary thinking about the first amendment. Modern prior restraint doctrine would rest on a more secure footing if it could be shown that injunctions can be identified with licensing systems as a matter of close analysis as well as rhetorical flourish.

The identification of salient common features shared by licensing systems and injunctions would also be a logical starting point for constructing a general theory of prior restraint that would help in deciding what additional methods of speech regulation should be disfavored.[17] In the present endeavor,

15. *See, e.g.*, Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 537-45 (1951); Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 725-30 (1978).

16. *See* Freund, *supra* note 15, at 539.

17. The label "prior restraint" could plausibly be applied to a wide variety

however, I confine myself to the problem of injunctions. I thus address only the core of the prior restraint doctrine, not the periphery. I do not even consider what should be done with specialized types of injunctions, such as interlocutory orders and injunctions to enforce contracts or fiduciary duties, that deviate from the prototype in significant ways. Nor do I explore whether the current presumption against prior restraint is too heavy or too light, or whether the standard for identifying permissible prior restraints should take the form of a categorical rule, a principle admitting of unspecified exceptions, or a balancing test. These can be important questions, but only if the central linkage at the root of modern prior restraint theory, the grouping together of licensing systems and injunctions, makes sense.

I begin with the *Near* opinion itself, to determine what prompted the Court to perceive an analogy between the peculiar Minnesota nuisance-abatement procedure and administrative licensing. Then I examine the "prototypical" injunction against speech, to see whether and how the analogy to licensing holds.

II. *NEAR v. MINNESOTA*

The statute at issue in *Near* provided that anyone who published a "malicious, scandalous, and defamatory" newspaper was guilty of a public nuisance subject to abatement.[18] The defense of truth was permitted only if the material was published "with good motives and for justifiable ends."[19] After publishing nine issues of the *Saturday Press*, a vituperative scandal sheet

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of regulatory procedures, especially if one adopts a functional definition emphasizing such features as informality of procedures, severity of impact on unformed speech, and discretion exercised by nonjudicial decisionmakers. Consider, for example: registration requirements; withdrawals of postal privileges; film classification systems; police surveillance practices; taxes and other cost impositions on publishing enterprises; inchoate crimes; systematic threats to enforce the criminal law; probation conditions; allocation judgments regarding public resources such as parade routes, meeting halls, or even lecture fees; administrative cease-and-desist orders; loyalty oaths and job disqualifications based on past or present beliefs; insurance requirements for demonstrators; restrictions on the use of certain equipment by media organizations; book seizures; arrest and bail procedures relating to prosecutions for advocacy; denial of press access to newsworthy events and records. The list could be extended almost infinitely. One reason we need a more satisfying theory of prior restraint is to do a better job of demarcating the ambit of the concept.

18. Act of Apr. 20, 1925, ch. 285, § 1, 1925 Minn. Laws 358.

19. *Id.*

if ever there was one,[20] the defendants were perpetually enjoined from publishing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."[21] Violation of the injunction was punishable by criminal contempt without benefit of trial by jury.

This Minnesota law did not establish a licensing system. Publishers, even those who had been enjoined, did not have to seek prior approval from anyone before publishing. Moreover, the judgment that a particular writing was prohibited by law was, under the Minnesota procedure, exclusively in the hands of a court of general jurisdiction. No defacing imprimatur, no bored and timid administrative censor, lurked in this scheme. Yet the Supreme Court pronounced the injunction in *Near* a prior restraint, and seized the occasion to establish the rejection of prior restraint as the central tenet of first amendment doctrine. One who would make sense of the modern doctrine of prior restraint must begin by determining exactly what the majority in *Near* found so objectionable about the Minnesota law.

Chief Justice Hughes's majority opinion is not an essay against regulating speech by injunction. The doctrine, well established at the time, that equity will not enjoin a libel is nowhere invoked.[22] The Court appears to have been moved by the "unusual, if not unique" features of a law that would treat offending newspapers as nuisances to be abated.[23] Four features in particular are mentioned in the *Near* opinion:

> *First.* The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. . . . "This law is not for the protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare."
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> *Second.* The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. . . .
>
> *Third.* The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. . . .
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> . . . .
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> *Fourth.* The statute not only operates to suppress the offending

20. The fascinating journalistic background of the *Near* decision is recounted in F. FRIENDLY, MINNESOTA RAG (1981).

21. Near v. Minnesota, 283 U.S. 697, 706 (1931) (quoting district court order).

22. Equity doctrine relating to libel is summarized and criticized in Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

23. Near v. Minnesota, 283 U.S. 697, 707 (1931).

> newspaper or periodical but to put the publisher under an effective censorship. . . . Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication.[24]

What is striking about these passages, certainly to one who cut his first amendment teeth on *New York Times Co. v. Sullivan*,[25] is the Court's characterization of the Minnesota law as a device to suppress criticism of government officials. Viewed in this light, the injunction at issue in *Near* is more analogous to a prosecution for seditious libel (under *Sullivan*, the paradigm violation of the first amendment) than was the damage award in *Sullivan* itself, which only purported to compensate an injured victim and punish the tortfeasor, not to suppress scandal as inimical to the public welfare. There is reason to believe, moreover, that the threat posed by the Minnesota law to robust criticism of government figured significantly in the Court's reasoning. Repeatedly, Chief Justice Hughes's opinion sounds the rejection-of-seditious-libel theme. He notes that in the eighteenth century, liberty of the press "was especially cherished for the immunity it afforded from previous restraint of the publication of *censure of public officers and charges of official misconduct*."[26] Surveying the American history of speech regulation, he finds "almost an entire absence of attempts to impose previous restraints upon publications *relating to the malfeasance of public officers*."[27] Turning to contemporary developments, Hughes observes that

> the administration of government has become more complex, the opportunities for *malfeasance and corruption* have multiplied, crime has grown to most serious proportions, and the danger of its protection by *unfaithful officials* and the impairment of the fundamental security of life and property by criminal alliances and *official neglect*, emphasizes the primary need of a vigilant and courageous press, especially in great cities.[28]

Even his response to the familiar liberty-but-not-license argument is limited to the seditious libel context: "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of

24. *Id.* at 709-12.

25. 376 U.S. 254 (1964). *See* Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

26. 283 U.S. at 717 (emphasis added).

27. *Id.* at 718 (emphasis added).

28. *Id.* at 719-20 (emphasis added).

the press from previous restraint *in dealing with official misconduct*."[29]

The Court's studied phrasing in the *Near* opinion is not the only evidence that at that time the concept of prior restraint was associated as much with the rejection of seditious libel as with the rejection of the injunction as a procedure for regulating speech. The *Near* opinion itself purports to base its holding on "the historic conception of the liberty of the press,"[30] a touchstone that calls for "regard to substance and not to mere matters of form."[31] Five years later, the Court invoked the *Near* precedent in striking down a Louisiana tax on newspapers that discriminated against those publications with the largest circulation.[32] Because the larger newspapers had been the chief critics of Governor Huey Long, the Court saw in the tax an attempt to suppress criticism of government. Not only did the Justices invalidate the tax; tellingly, they labeled it a prior restraint.[33] In contrast, during the 1940s the Court on several occasions failed to invoke the concept of prior restraint while striking down state court injunctions prohibiting labor picketing.[34]

This substance-over-procedure thesis can be pushed too far. The Court in *Near* clearly was disturbed by the dynamics of the Minnesota scheme. Chief Justice Hughes noted, for example, that under the statute a publisher "undertaking to conduct a campaign to expose and to censure official derelictions" may have his newspaper declared a public nuisance to be abated "unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends."[35] Once enjoined, Hughes observed, a publisher may have an even more difficult burden of proof, for the Minnesota Supreme Court had implied that "at least with respect to a new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be 'usual and legiti-

29. *Id.* at 720 (emphasis added).
30. *Id.* at 708.
31. *Id.*
32. Grosjean v. American Press Co., 297 U.S. 233 (1936).
33. *Id.* at 249.
34. *See, e.g.*, Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293 (1943); Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 769 (1942); AFL v. Swing, 312 U.S. 321 (1941).
35. Near v. Minnesota, 283 U.S. 697, 711-12 (1931).

mate' and consistent with the public welfare."[36] This demand that a publisher "satisfy the court as to the character of a new publication" is given in the *Near* opinion as a major reason why the Minnesota nuisance abatement procedure constitutes "the essence of censorship."[37]

In sum, *Near v. Minnesota* represents a judgment more complex, and more historically grounded, than the facile equation of injunctions with licensing systems. The Court's conclusion that the injunction at issue amounted to a prior restraint depended, at least to some extent, on: the content of the speech (criticism of government) at which the injunction was directed; the avowed purpose of the Minnesota nuisance law to suppress not simply specified writings but also new efforts in the same vein by the persons enjoined; the intrinsic vagueness of the standards of legality embodied in the law; the placement of certain key burdens of proof on the publisher rather than the government; and the state's purpose to regulate disfavored writings as a matter of public policy rather than to redress or prevent private wrongs.[38] To conclude that such a regulatory scheme, "tested by its operation and effect,"[39] amounts to a prior restraint is by no means to establish the proposition that all injunctions against speech deserve the same fateful characterization.

III. COMMON FEATURES OF LICENSING SYSTEMS AND INJUNCTIONS: BEGINNING THE SEARCH FOR A RATIONALE

A. The Prototypes

There are many kinds of licensing systems and several types of injunctions. Variations in detail within these broad forms of regulation can be significant. First amendment analysis would be complicated to the point of paralysis, however, if each peculiar variant had to be assessed in relation to every other variant before a "general" presumption could be applied to certain of the variants. Instead, as is often true in legal analysis, some generalizing based on prototypes is both unavoidable and efficacious. Only if the common prototypes of the speech-restrictive injunction and licensing system cannot be

36. *Id.* at 712-13.
37. *Id.* at 713.
38. *Id.* at 715-21.
39. *Id.* at 708.

shown to share significant and unique common features can it be said that the concept of prior restraint lacks coherence.

My prototype for a licensing system is a procedure that requires a would-be speaker to obtain a permit from an administrative official before proceeding to speak; makes no provision for a formal hearing before that official; subjects permit denials to expeditious review by a court; and provides that persons who speak without a required permit can be criminally punished for that act alone, without regard to whether they would have been constitutionally entitled, had they pursued that course, to obtain a license for the speech that is the subject of the prosecution. The prototypical injunction I consider is what Owen Fiss calls the non-interlocutory preventive injunction: a judicial order, instituted after an adversary proceeding, that prohibits identified persons from engaging in specified communicative activities, on pain of being held in criminal or civil contempt by the judge who issued the injunction.[40]

Even in a consideration of prototypes, however, one important variation among injunctions must be taken into account. As a result of the Supreme Court's decision in *Walker v. City of Birmingham*,[41] a speaker sometimes may not violate an injunction as a means of testing its constitutionality. Instead, the enjoined speaker is obligated to mount a constitutional challenge by moving to have the injunction vacated or modified, even if the claim is that the injunction is unconstitutional on its face. Under what is known as the collateral bar rule, failure to seek such anticipatory relief precludes the speaker from invoking a first amendment defense in a criminal contempt of court proceeding for violating the injunction.[42] This withdrawal of self-help as a permissible remedy differentiates injunctions from criminal prohibitions and civil liability rules, the violation of which may actually be the preferred way to join the issue of their constitutionality.

As some leading commentators have observed, it is the collateral bar rule rather than any of the other features of the in-

40. Fiss surveys the various types of injunctions in O. FISS, *supra* note 13, at 8-12.

41. 388 U.S. 307 (1967).

42. *See generally* Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86 (1948); Rodgers, *The Elusive Search for the Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings*, 49 B.U. L. REV. 251 (1969); Selig, *Regulation of Street Demonstrations by Injunction: Constitutional Limitations on the Collateral Bar Rule in Prosecutions for Contempt*, 4 HARV. C.R.-C.L. L. REV. 135 (1968); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970).

junctive procedure that may warrant a special first amendment presumption against injunctions that restrict speech.[43] Take away the collateral bar rule, these commentators say, and the case for regarding injunctions as especially inimical to first amendment values dissipates. Since licensing systems also restrict the use of self-help by would-be speakers, any analogy between the two forms of regulation that are commonly labeled prior restraint may hold only to the extent that injunctions are governed by the collateral bar rule. Some lower courts have gone so far as to hold that certain judicial orders prohibiting publication are not prior restraints precisely because they are not subject to the collateral bar rule.[44]

These observations would pose no particular problem for the present analysis were it not for the fact that the scope of the collateral bar rule for injunctions is highly uncertain. Restricted to its facts, *Walker* held only that self-help in the form of a street demonstration involving hundreds of protestors in a context of racial tension and violence is not a constitutionally protected method of testing the validity of an injunction, at least when other available avenues of legal relief have not been explored by the speakers.[45] In subsequent cases, the Court has permitted persons to violate other kinds of judicial orders and still raise certain constitutional defenses in contempt proceedings.[46] Lower courts have often limited the applicability of

43. *See* O. FISS, *supra* note 13, at 30, 73; Barnett, *supra* note 14, at 553.

44. *See, e.g.*, Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975); Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782 (E.D. La. 1977). *See also In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979) (thorough discussion in dictum of relationship between prior restraint and collateral bar doctrines); Zarate v. Younglove, 86 F.R.D. 80 (C.D. Cal. 1980) (applicability of collateral bar rule an important but not sole factor in determining whether an order is a prior restraint).

45. 388 U.S. at 320. The *Walker* opinion does not allude to the unusual potential for disruption that self-help in the context of street demonstrations might pose. Rather, the majority discusses the collateral bar rule as though it were applicable in all contexts. With regard to the failure to explore alternative remedies, however, the opinion is explicit:

> This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period.

Id. at 318-19.

46. *See, e.g.*, Maness v. Meyers, 419 U.S. 449 (1975) (violation of court order to produce evidence; privilege against self-incrimination allowed to be invoked

Walker.[47] Some state courts have declined to adopt the collateral bar rule as a matter of state equity law.[48]

Thus, any effort to compare injunctions with licensing systems, criminal prohibitions, and civil liability rules must take into account the controversial nature and uncertain scope of the collateral bar rule. Two prototypes of the injunction against speech must be considered: one with and one without the collateral bar rule. First, I shall pursue my analogical inquiry assuming that self-help challenges to injunctions are *not* permitted—assuming, that is, that the collateral bar rule of *Walker* applies. As will be seen, that assumption makes easier the case for linking together licensing systems and injunctions as methods of regulation that are especially problematic under the first amendment. Then I shall explore what remains of the rationale for linkage if the assumption is reversed and the collateral bar rule is held not to govern. Only if the rationale remains convincing under that assumption would we have a theory of prior restraint that transcends the controversy over the validity and scope of the collateral bar rule.

B. Points of Comparison

Initially, it is worth noting what licensing systems and injunctions do *not* have in common. A licensing system is objectionable in part because it subjects a wide range of expression to scrutiny: a film licensing board typically requires the submission of all films that are to be exhibited in the jurisdiction; a parade permit ordinance requires all would-be marchers to apply.[49] That is not true of all, or even most, injunctions. Normally, even the broadest of injunctions binds only certain designated speakers whose past or proposed speech activities have engendered unusual official concern.

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at contempt hearing); Branzburg v. Hayes, 408 U.S. 665 (1972) (violation of court order to testify after motion to quash subpoena denied; defendant allowed to raise first amendment defense in contempt proceedings). *See also* United States v. Ryan, 402 U.S. 530, 532 (1971) (Court reaffirmed the traditional doctrine that the denial of a motion to quash a subpoena is not appealable because the proper forum for contesting the validity of a subpoena is the contempt proceeding).

47. *See, e.g., In re* Timmons, 607 F.2d 120 (5th Cir. 1979); *In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979); Goldblum v. NBC, 584 F.2d 904 (9th Cir. 1978); Glen v. Hongisto, 438 F. Supp. 10 (N.D. Cal. 1977); Cooper v. Rockford Newspapers, Inc., 50 Ill. App. 3d 250, 365 N.E.2d 746 (1977).

48. *See, e.g.*, State v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (1971); *In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

49. The range of activities governed by the regulatory scheme is a factor emphasized in Emerson, *supra* note 3, at 655-56.

Licensing systems are also troublesome because the initial decision to disallow speech is made by an administrative officer who specializes in suppression, and who will be held accountable for the harmful consequences of any communicative activity that is given approval.[50] Moreover, under the typical licensing procedure there is no adversary hearing before the administrative officer who decides in the first instance whether to allow or suppress the speech.[51] In contrast, injunctions are issued by courts of general jurisdiction after full adversary hearings.

Injunctions are sometimes considered dangerous to liberty because violations of their terms can be punished expeditiously in contempt proceedings.[52] This might have been a major consideration in the days when persons charged with contempt of court enjoyed none of the basic rights, such as trial by jury, that are available to defendants in criminal prosecutions. Today, however, the rights of the accused in the two proceedings are substantially similar.[53] Any differences that remain—and the major difference would seem to be that contempt charges are adjudicated with much less pretrial delay—cannot be a basis for linking injunctions with licensing systems because the standard enforcement mechanism for a licensing system is a criminal prosecution for speaking without the required permit.

In the same vein, injunctions might be thought to be governed by an undesirable logic of rigid enforcement because the decision to prosecute persons who disobey them typically is made by the issuing judges, who may be overly sensitive to perceived affronts to their authority, rather than by district attorneys, who must always decide whether the violation of a law is serious enough to justify the commitment of limited prosecutorial resources.[54] Again, this feature, while arguably significant, is not one shared by licensing systems. Persons who violate permit requirements are sanctioned only if a dis-

50. This concern was voiced centuries ago by John Milton. *See* J. MILTON, THE PORTABLE MILTON 176-77 (D. Bush ed. 1949). For a modern formulation of the point, see Emerson, *supra* note 3, at 658-59.

51. For an argument that prior restraint should be *defined* in terms of the adequacy of the adjudicative process that precedes the judgment of disallowance, see Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519 (1977).

52. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 61 (1975).

53. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 96-98 (1973). The procedures for contempt proceedings and criminal trial are compared in the text accompanying notes 90-93 *infra*.

54. *See* Emerson, *supra* note 3, at 657.

trict attorney determines that prosecution is warranted in light of the seriousness of the offense and competing pressures on the criminal docket.

What then is it that licensing systems and injunctions have in common that unites them in the mind of the first amendment theorist? I can think of five potentially important features that appear on the surface to be shared by licensing systems and injunctions, and appear not to be shared, at least to the same extent, by criminal laws and civil liability rules: (1) the tendency, when the practical dynamics of the scheme are considered, to induce persons to engage in an unusually high degree of self-censorship of constitutionally protected expression; (2) the adjudication of constitutional claims at a time and in a manner that produces a formal, abstract quality of decision making; (3) the tendency to be used too readily; (4) an unusual capacity to distort the way audiences respond to communications; and (5) implicit premises that are antithetical to the philosophy of limited government. If any one or combination of these features turns out on close analysis to be notably more characteristic of both licensing systems and injunctions than of the standard "subsequent" sanctions on speech, and also significant in terms of first amendment values, we would have the beginnings of a theory of prior restraint.

IV. SELF-CENSORSHIP

"Self-censorship" is an important phenomenon in first amendment analysis. Speakers, listeners, and society at large all suffer when the peculiar features of a regulatory scheme have a "chilling effect" on persons that causes them to forgo protected expression rather than get themselves enmeshed in the scheme. Since the early 1960s the Supreme Court has relied heavily, perhaps too much so, on this phenomenon of self-censorship as a basis for invalidating laws that regulate speech.[55] It is easier to speculate about the possible unintended inhibitory effects of a law than to explain why its intended effects violate the first amendment. Particularly when the issue is the propriety of procedures, the self-censorship rationale is inviting: the Court need not characterize a procedure

55. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1976); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960). *See generally* Schauer, *supra* note 15; Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

as unfair in the sense of tending to generate improper results, only as too burdensome. It is a sign of the times that all the leading writers on prior restraint in the last decade—Bickel, Fiss, Barnett, Kalven, Litwack, Murphy, Schauer—have treated the self-censorship phenomenon as either the exclusive or the central consideration in deciding whether prior restraints should be disfavored.[56]

All laws regulating speech, criminal prohibitions and civil liability rules no less than other procedures, are designed to have one sort of "chilling effect": to deter persons from engaging in speech activities the ill effects of which are a legitimate basis for imposing regulatory restraints or sanctions. Moreover, even the most narrowly designed laws are bound to induce a measure of self-censorship of protected expression, at least so long as it takes some amount of time, effort and/or money to vindicate one's rights. The question to be examined is whether as a general matter the licensing system and the injunction induce significantly more self-censorship of speech that is protected under prevailing first amendment standards than the criminal prohibition and the civil liability rule. The proposition is stated vividly by Professor Bickel: "A criminal statute chills, prior restraint freezes."[57]

The term "self-censorship" is used to describe a multiplicity of behavioral effects. Some would-be speakers may forgo speech that arguably is not even prohibited by the statute or injunction in question, simply because out of an abundance of caution they wish to "steer far [wide] of the unlawful zone."[58] Other speakers may forgo only speech that is clearly prohibited by the statute or injunction, but may fail to mount a constitutional challenge to the state's regulatory endeavor. A third group of speakers may pursue their constitutional remedy for a time, but eventually may alter or abandon their speech plans as a result of becoming enmeshed in the process of litigation. In each of these instances the quality or quantity of communication is diminished even though the speech in question may be constitutionally protected. There is reason, therefore, to consider these various behavioral effects together under an om-

56. *See* A. BICKEL, *supra* note 52, at 61; O. FISS, *supra* note 13, at 69-74; Barnett, *supra* note 14, at 558-60; Kalven, *supra* note 2, at 34-35; Litwack, *supra* note 51, at 549-54; Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898, 906-07, 910-15, (1976); Schauer, *supra* note 15, at 694-701.

57. A. BICKEL, *supra* note 52, at 61.

58. Speiser v. Randall, 357 U.S. 513, 526 (1958).

nibus concept like self-censorship, so long as the disparate strands can be separated when the analysis requires.

Self-censorship can be caused by many factors. Certainly a law's substantive features have a great deal to do with how much self-censorship it induces. Procedural features also can be expected to have an impact. Thus, the notion of self-censorship can serve as a kind of common denominator in first amendment analysis. Self-censorship effects that stem from diverse causes can be added up, and the collective impacts in this regard of the various procedures for regulating speech can be compared. What matters, therefore, is not whether each distinct cause of self-censorship is shared by licensing systems and injunctions, but whether in general those two forms of speech regulation share the quality of being especially inhibitory of protected expression. The ultimate proposition, it must be remembered, is not just that licensing systems and injunctions are comparable in terms of the self-censorship they engender, but also that they are significantly more burdensome in this regard than the prototypical subsequent punishments.

This last proposition is by no means self-evident. In some respects, licensing systems and injunctions seem preferable to criminal prohibitions and civil liability rules in terms of minimizing the deterrence of protected expression. Under a regime of criminal or civil sanctions, speakers ordinarily can test the limits of first amendment protection only by engaging in speech and risking sanctions should they guess wrong about the extent of their rights. Under a licensing procedure, in contrast, speakers can obtain a definitive ruling that their proposed acts of expression are constitutionally protected. Injunction procedures also provide for advance adjudication of speakers' rights. Although that adjudication will not invariably determine the extent of the state's power to impose subsequent sanctions for the speech in question, in most instances the speakers will learn a great deal from the injunction procedure regarding what acts of expression can be undertaken with impunity.

Under systems of subsequent punishment, the risk of self-censorship due to uncertainty is likely to be compounded by the potential severity of the sanctions that can be imposed against speakers. Except in the area of defamation, and there only in one limited respect, the Supreme Court has been unwilling to erect constitutional limitations on how severely persons can be sanctioned for engaging in unprotected expres-

sion.[59] Long criminal sentences and enormous civil damage awards are not uncommon, even for speech at the margins of constitutional protection.[60] Persons who violate permit requirements and injunctions can also be punished severely, but usually not for guessing wrong about the extent of their rights, only for failing to utilize available procedures for determining in advance the limits of those rights. Moreover, sanctions for the violation of injunctions and permit ordinances tend to be light in comparison with those commonly administered under the subsequent punishment regimes.[61]

Thus, even if licensing systems and injunctions are found to share the quality of causing considerable self-censorship in distinctive (though not identical) ways, the case is not necessarily compelling for basing a theory of prior restraint on this particular common feature. Such a theory would be viable only if the collective self-censorship effects of each "prior" form of regulation were to exceed the considerable self-censorship effects that can be traced to the distinctive features of criminal and civil sanctions.

I now examine several features of the two "prior" regulatory regimes that might cause significant self-censorship. I assess the importance of each feature for licensing systems, injunctions, and where appropriate for the subsequent punishment regimes as well. Some of these features that may cause self-censorship might also be objectionable on other grounds, such as the tendency to generate undesirable substantive decisions regarding what speech is protected by the first amendment. It is a great mistake to think about prior restraint exclusively in terms of alleged chilling effects. Those other grounds will be examined later to see whether they provide a

59. The exception is in the area of defamation, where the Court has held that punitive damages may not be assessed absent reckless disregard for the truth on the part of the defendant. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In his memorable dissent in Abrams v. United States, 250 U.S. 616 (1919), Justice Holmes argued that the defendant's conduct was protected, but also observed that "the most nominal punishment seems to me all that could possibly be inflicted." *Id.* at 629. The actual sentence was twenty years. This intimation of a first amendment limitation on the severity of criminal sanctions has never been taken up, to my knowledge.

60. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) ($460,000); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ($500,000); Herndon v. Lowry, 301 U.S. 242 (1937) (eighteen to twenty years); Debs v. United States, 249 U.S. 211 (1919) (ten years).

61. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307, 312 (1967) (five days in jail and a $50 fine, the maximum sentence permitted by Alabama law); Lovell v. Griffin, 303 U.S. 444, 447 (1938) (fifty days or $50).

basis for linking injunctions with licensing systems. For the moment, however, the concern is only with how the features to be discussed relate to the "common denominator" of self-censorship.

A. The Burden of Initiative

We may assume that on occasion licensing systems have a chilling effect on protected expression by the way they shift the burden of initiative: some persons would rather forgo the opportunity to engage in protected expression than take the time and trouble to obtain the required permit. It is difficult to generalize about this phenomenon, however. For many activities that require a permit, a great deal of organizational or entrepreneurial effort is necessary quite apart from the demands of the licensing procedure. Film exhibitors and parade organizers, for example, need attend to so many details that the incremental burden represented by the need to file a permit application seems negligible. The burden of initiative is likely to matter most in the case of unsophisticated speakers who are intimidated by the prospect of a bureaucratic encounter, religious groups like the Jehovah's Witnesses whose tenets forbid seeking advance permission to spread the word of God,[62] and persons who are fired by a fleeting impulse to speak out on some matter of the moment. Licensing systems that require every small detail of a communicative activity to be approved might have an especially broad self-censorship impact as speakers may often decide that desired last-minute changes are not worth the bother of submitting a revised permit application.[63] Thus, the burden of initiative imposed by licensing systems should be a highly variable factor in the self-censorship calculus, but probably exerts a significant effect in enough contexts to justify the conclusion that licensing systems are somewhat problematic on this count.

Can the same be said for injunctions? Under the collateral bar rule, the issuance of an injunction shifts the burden of initiative onto the would-be speakers. They must institute judicial proceedings to vacate or modify the injunction; failure to do so results in a forfeiture of the right to speak, even when their contemplated acts of expression are constitutionally protected. The net effect of the collateral bar rule is that the issuance of an injunction may engender in the persons against whom it is

62. Lovell v. Griffin, 303 U.S. 444, 448 (1938).
63. *See* J. Milton, *supra* note 50, at 179.

directed a certain degree of self-censorship in the same manner as under a licensing system: by mobilizing the force of inertia on the side of suppression.

The two procedures are not quite analogous, however, in terms of the self-censorship phenomenon. Once a licensing system is established, it operates continually until repealed. Officials do not have to take action repeatedly to effect the shift in the burden of initiative. When speech is regulated by injunction, in contrast, the burden remains on the would-be suppressors of speech (government or private parties) until they have taken the trouble to sue for the injunction and satisfied the burden of proof to justify its issuance. Thus, under a licensing system, a burden of initiative is routinely imposed on all persons who would like to engage in the expressive activity that is subject to the permit requirement, whereas under an injunctive system only selected potential speakers are so burdened.

Once an injunction issues, it is true, the burden of initiative disfavors the speakers just as under a licensing system. Moreover, the burden that enjoined potential speakers must discharge is more severe than that represented by the obligation to submit a permit application. To vacate an injunction, a speaker must go to court; the assistance of counsel is a practical necessity. In most licensing systems, the permit application process is far less imposing. If the comparison is between the stages of the two procedures at which speakers first have to take the initiative, the broader impact of licensing systems would seem to be offset to some extent by the possibly more pronounced impact of injunctions.

On the other hand, speakers under injunction may represent a specialized population that is less likely, as compared with the population of potential speakers subject to a licensing system, to be deterred from speaking by an adverse burden of initiative. Passive or tentative persons are seldom enjoined. Usually, injunctions issue in response to controversial acts of expression or noteworthy preparations to speak or publish. Persons who have overcome their inertia enough to provoke an injunction can normally be expected to exploit whatever procedures are available for lifting the restraint. No doubt some speakers faced with the threat or reality of an injunction decide to abandon their expressive projects. Speakers who are neither zealous nor driven by the profit motive, and those who do not have ready access to competent legal advice, are likely to be deterred the most. Given the specialized nature of the relevant

population, however, one might question whether as a general matter inertia is a major factor contributing to the self-censorship effect of injunctions.

There is something to this point, but only if we take as given the current sparing use of the injunction as a method of social control. That sparing use may itself be partly a function of the doctrine of prior restraint. One can imagine a world in which anti-speech injunctions were sought and issued with regularity; subpoenas to compel the testimony of news reporters were once a rarity.[64] Were injunctions against speech to become more commonplace, the population of enjoinees would become less specialized and probably more prone to self-censorship. Thus, one who adopts a pathological framework for thinking about first amendment questions—a course I have advocated elsewhere[65]—should accord only a small amount of significance to the fact that currently the kinds of persons who are enjoined not to speak are not easily deterred by a burden of initiative. From the pathological perspective, the burden of initiative can be a distinctive source of self-censorship in both licensing and injunctive systems.

B. DELAY

Under a licensing system, speakers who have no qualms about taking the initiative and are not troubled by the time and effort required to draft a permit application may nonetheless censor themselves on account of the delays that are inherent in the licensing process. Self-censorship from this source could take two forms. The speakers might decide not to apply for a permit because they anticipate that by the time the permit is issued the occasion for speaking will have passed. Alternatively, they might apply for a permit and even contest a denial in court, but lose their enthusiasm for speaking as a result of the delay to which they have been subjected.

Under the Supreme Court's holding in *Freedman v. Maryland*,[66] licensing officials cannot sit on permit applications in-

64. For a discussion of the social forces that led to a geometric increase in the practice of subpoenaing news reporters, see Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971).

65. Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B. FOUNDATION RESEARCH J. 521.

66. 380 U.S. 57 (1965). In violation of a Maryland statute, the appellant exhibited a film without first submitting it to the Maryland State Board of Censors for approval. The Court held that a statute requiring prior submission must provide certain procedural safeguards:

> First, the burden of proving that the film is unprotected expression

definitely. Instead, officials must "within a specified brief period, either issue a license or go to court to restrain [the proposed expression]."[67] In addition, "the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."[68] There is every reason to believe that the *Freedman* standards, formulated in the context of film censorship, are required of all licensing systems that regulate any form of protected expression.[69]

The procedures required by *Freedman* minimize the impact of delay. By no means, however, do they eliminate all delay created self-censorship, for even short delays can be discouraging in certain circumstances. Moreover, there is no requirement in *Freedman* that the appellate process be expedited; permit applicants who lose the first round of court proceedings can face indefinite delays, at least in theory.[70] At some point, no doubt, the permit applicants would be permitted to engage in self-help, but the court decisions do not specify when.[71] In contrast, criminal prohibitions and civil liability rules always permit speakers to engage in self-help, to speak at

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> must rest on the censor. . . . Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. . . . [O]nly a procedure requiring a judicial determination suffices to impose a valid final restraint. . . . [T]he exhibitor must be assured . . . that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. . . . [Finally,] the procedure must also assure a prompt final decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Id. at 60.

67. *Id.* at 59.

68. *Id.*

69. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

70. In National Socialist Party v. Village of Skokie, 432 U.S. 43, 44 (1977), the Court held in a brief per curiam opinion that injunctions against speech must be stayed if they are not subject to expeditious appellate review. The Court cited *Freedman v. Maryland* by way of analogy, perhaps suggesting that the Justices now read *Freedman* to require expeditious appellate review.

71. In Poulos v. New Hampshire, 345 U.S. 395 (1953), the Court held that a prospective speaker who is denied a permit must challenge the denial in court rather than by means of self-help. The defendant raised the spectre of a long delay, possibly lasting years, before his rights could be fully adjudicated. The Court was unmoved: "Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning." *Id.* at 409. Justice Frankfurter limited his concurrence to the situation in which there is available prompt judicial redress for a wrongful permit denial. *Id.* at 420.

the most desired time and be held to account later. In that regard, licensing systems can be viewed as more conducive to self-censorship than the standard subsequent punishments.

Injunctions may engender delay created self-censorship on account of the collateral bar rule. Enjoined speakers must hold their tongues while they move to have the injunction vacated or modified. The delay imposed by that obligation cannot be too extended, however, because the Supreme Court has held that states must either stay injunctions against speech or provide an expeditious procedure for vacating them.[72] Under *Walker*, moreover, a speaker who meets with "delay or frustration" in seeking to vacate an injunction need not forgo speaking indefinitely.[73] At some point, self-help is permissible. In the context of mass demonstrations that require special arrangements and the coordination of numerous people, that point presumably is reached when the marchers' motion to vacate has not been ruled upon by the time of the scheduled march. *Walker* does not specify, however, whether enjoined marchers can keep to their original schedule by engaging in self-help if their motion to vacate has been denied but is pending on appeal on the date of the planned march.[74] Nor is it clear when, if ever, self-help is permissible for an enjoined film exhibitor desiring to meet an advertised opening date or an enjoined newspaper desiring to publish a topical article. The uncertainty that surrounds both licensing systems and injunctions regarding the permissibility of self-help is itself a possible cause of self-censorship on the part of speakers who are concerned about delay.

If self-help doctrines were to emerge that were both reasonably clear and similar for the two procedures, delay costs would probably be more serious in the case of injunctions. Permit applicants sometimes can take the possibility of litigational delay into account in timing their applications. Enjoined speakers typically have less control over when the legal issue is joined, and may be discouraged or incapacitated by unexpected delays. On the other hand, frequently an injunction simply orders speakers not to repeat the communicative activity that provoked the injunction in the first place. Timing may be less important in the case of encores, and hence have little impact on self-censorship.

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72. *See* National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).

73. 388 U.S. at 318-19; *see* note 45 *supra*.

74. For a detailed discussion of this interpretative question, see Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481 (1970).

On the whole, the disallowance of self-help under both licensing and injunction regimes constitutes a common feature of some significance. Although one can never be certain about the impact of delay, it is plausible that on some occasions persons who lose control over the timing of their utterances thereby lose their desire to speak. Self-censorship of this variety does not operate under the subsequent punishment regimes.

C. Fear of Bias

Concern about the biases of administrative censors has always been a prominent part of the case against licensing speech.[75] Similar bureaucratic biases do not plague the injunction process, but other biases can operate, such as the personal affront judges may feel when their injunctions are disobeyed. If these bureaucratic and judicial biases could be shown to share features of importance in first amendment theory, the phenomenon of decision making bias might figure directly in a theory of prior restraint. At this stage, however, the concern is with the indirect effects of possible bias: the self-censorship that perceived bias on the part of licensing officials and judges might engender. For this purpose, it is not important whether the biases of the two types of decision makers are similar in nature, or even whether such biases exist at all. What matters is whether this possible source of (perhaps irrational) self-censorship should be taken into account in computing the overall toll of self-censorship for each regulatory form.

With regard to licensing systems, the fear of administrative bias reduces in theory to a concern for delay. For under *Freedman* no would-be speaker can be denied a permit by a licensing official: the official must go to court to get a judicial order validating the permit denial.[76] Even under a licensing system, therefore, the actual decision-maker is a judge; the administrative censor's power is only to disallow speech pending expeditious adjudication. Of course, in practice a decision by a licensing official not to grant a permit may be given some deference by judges, contrary to an explicit provision of the *Freedman* doctrine.[77] More importantly, potential speakers often will be unaware of the *Freedman* procedures. In deciding whether to forgo possibly protected speech rather than do what

75. *See, e.g.*, Emerson, *supra* note 3, at 658.
76. *See* text accompanying notes 66-68 *supra*.
77. Freedman v. Maryland, 380 U.S. 57, 58 (1965).

it takes to get a permit, speakers are likely to focus on the attitudes they perceive in the administrative officials to whom they must apply in the first instance.

These practical considerations are difficult to assess. They would seem to vary greatly with the content and form of the speech in dispute, the identity of the licensing officials, the quality of legal advice available to the speakers, and the incentives (financial or otherwise) impelling the permit applications. For example, a parks commissioner's decision not to allow a mass demonstration on account of the competing uses that would be displaced is likely to receive more deference from a court than a film censorship board's judgment to suppress a film on grounds of obscenity. Similarly, the perception would-be speakers have of likely administrative bias in the processing of parade permit applications might depend on whether that administrative task is assigned to the police department, the parks commission, or the city council, as well as on the current state of relations in the municipality between public officials and dissidents. High profit exhibitors of x-rated films are likely to know all about *Freedman v. Maryland*, and to be inured to any biases they may perceive in the local film licensing board. In short, self-censorship traceable to the fear of bias in licensing systems should be regarded as highly dependent on context. If a generalization must be hazarded, the phenomenon should probably be viewed as neither negligible nor highly significant.

For injunctions the dynamics of self-censorship due to the fear of bias would seem not to vary so much with context. The potentially biased officials are all judges, and traditional equity procedures add a note of regularity and accountability to the decision making process. Nevertheless, some judges no doubt are influenced on occasion by personal hostility to certain speakers or points of view. Since both motions to vacate and proceedings for contempt are typically heard by the same judge who issued the injunction in the first place,[78] any judicial bias that appears is likely to permeate the injunctive process. The antidote for a victimized speaker is an appeal, either from the denial of a motion to vacate or from a contempt conviction. But appeals take time and money, and some appellate judges will probably be inclined to support their lower court brethren if the conduct of the speaker can be viewed in any way as a challenge to judicial authority. It is reasonable to assume that

78. *See* O. FISS, *supra* note 13, at 30-31.

some speakers are deterred from pursuing their constitutional claims by the bias they perceive in the judge at the issuance stage of the injunctive proceedings.

Of course, the fear of bias can also cause self-censorship under the subsequent punishment regimes. If police or prosecutors in a locality are perceived as hostile to certain forms of expression—sexually explicit films, for example, or civil rights protests—some potential speakers will no doubt choose the path of silence. Social stigma and potentially heavy sentences make criminal prosecution an especially intimidating prospect for most persons. When the criminal process, the ultimate assertion of state authority, is perceived as breaking down due to prosecutorial or judicial bias, the intimidating effect on speakers is likely to be greater than when licensing or injunctive processes are so perceived.

It might be contended, however, that bias is endemic to licensing and the injunctive process, but only an occasional problem in the realm of criminal prosecutions. If that were true, the self-censorship rationale for linking injunctions with licensing systems would be strengthened. There is little reason to believe, however, that bias is so endemic to the prior forms of regulation, and so exceptional in the subsequent punishment regimes. More importantly, there is no reason to believe that potential speakers view licensing systems and injunctions as being more plagued by bias than the criminal process. Although the fear of prosecutorial and adjudicative bias is probably one of the most significant causes of self-censorship under all regulatory regimes, it is doubtful whether the prior forms of regulation are especially problematic in this regard.

D. Personalization

Injunctions and licensing systems have a personalized quality that is not fully shared by the subsequent punishment regimes. Speakers who are enjoined are told, typically in personal terms, not to engage in particular acts of expression. Permit applicants whose requests are refused are personally told that their proposed communicative activities are officially disapproved. Criminal and civil defendants get a lot of personal attention as well, but usually only after the time when self-censorship is possible. At the stage in the regulatory process when the behavior of speakers might be affected, the subsequent punishment regimes speak in impersonal terms. This difference may go far to explain why the prior forms of regulation

are commonly thought to cause more self-censorship than the subsequent punishment regimes.

To analyze the specific impact of personalization in injunctive and licensing proceedings, it is necessary to define self-censorship precisely. "Self-censorship" in the form of a speaker's unwillingness to violate the clear terms of an injunction or speak without a required permit should be of no concern so long as a collateral bar rule is operative. Even though the communications that are thereby lost might have qualified for first amendment protection in terms of their content and consequences, an analysis that accepts the legitimacy of the collateral bar principle should not count as a cost the eschewing of self-help under circumstances when that remedy is disallowed. Properly to be considered in assessing the self-censorship effects of personalization, however, is the unwillingness of prospective speakers either to contest the validity or test the limits of injunctions and permit denials. Persons who choose the path of silence in this way have forsaken the opportunity to engage in what might be determined to be constitutionally authorized forms and procedures of expression.

As a general matter, one might expect less self-censorship from the personalized nature of permit denials than from the personalized nature of injunctions, for two reasons. First, at the stage of the licensing process when a personalized judgment is first issued, the next move is up to the licensing authorities, who are required to go to court and discharge the burden of persuasion to have the denial validated.[79] Rejected permit applicants can always decide not to contest the government at this stage, but the normal procedural dynamics encourage the speakers to join issue and assert their constitutional claims. The burdens and dynamics cut in just the opposite direction in the case of injunctions: when the personalized admonition is issued, the next move is up to the speakers. Second, when the personalized order is first issued in the licensing context, the speakers ordinarily have not yet had a chance to argue their case. They can be expected to challenge the permit denial partly out of a desire to be heard. In contrast, in the case of non-interlocutory injunctions, the prototype for the present analysis, a full adversary hearing precedes any personalized order. Speakers who have already lost one day in court may be somewhat chary about pressing on with their constitutional

79. This is one of the requirements of *Freedman v. Maryland*, discussed at note 66 *supra*.

contentions. These are general considerations that should play some role in all the various self-censorship scenarios relating to personalization. A more particularized comparison of injunctions and licensing systems can be undertaken if we examine separately the different ways in which the personalized nature of the legal command may cause speakers who are enjoined or refused a permit to comply with the restraint rather than challenge it in a manner permitted by law.

The phenomenon of personalization has at least three consequences that might induce self-censoring compliance. First, a personal admonition brings the existence of a legal prohibition and the possibility of sanctions directly to the attention of the potential speaker. Awareness can engender compliance. Second, personalization may in fact increase the likelihood that a violation of the restraint on speaking will be prosecuted, a factor that should loom large in the calculations of any person who contemplates testing the limits of a restrictive legal obligation. Third, the phenomenon of personalization can induce compliance by contributing to the mystique of a legal norm. To understand how the personalized character of injunctions and licensing systems might cause self-censorship, it is necessary to examine how each of these consequences might affect the behavior of potential speakers who are enjoined or refused a permit.

Some injunctions doubtless bring the possibility of sanctions to the attention of potential speakers who might otherwise sally forth on their expressive ventures in blissful ignorance. Moreover, even speakers who would have been informed in any event about the pertinent laws restricting speech might be more preoccupied by the threat of sanctions after receiving the rebuke that is implicit in an injunction. Levels of awareness and consciousness have much to do with a person's or group's inhibitions.

However, so long as some instances of communication can legitimately be prohibited, not all the speech that is lost as a result of heightened awareness on the part of potential speakers can be counted a cost. The concept of self-censorship relates only to the loss of constitutionally protected expression. Furthermore, we might expect the toll extracted by awareness alone—apart from such other considerations as the burden of initiative and delay—to vary inversely with the strength of the self-censor's first amendment claim. Enjoined speakers who have strong constitutional claims should not be deterred from

asserting them via motions to vacate simply by the knowledge that some officials and one judge disapprove the intended communication.

Of course, would-be speakers confronted with injunctions know for certain that their proposed communications are officially disapproved but can only speculate about whether they are constitutionally protected. Under the subsequent punishment regimes, in contrast, potential speakers ordinarily must speculate on both counts. In this respect, the more precise information available to speakers under the injunctive method of regulation may induce a measure of self-censorship of constitutionally protected communications.

On the other hand, traditional self-censorship doctrine is concerned primarily with the inhibitions that are engendered when speakers are uncertain whether their proposed acts of expression are officially disapproved.[80] The void-for-vagueness doctrine and one major aspect of the overbreadth doctrine reflect that concern.[81] Precisely because they are personalized, injunctions can be tailored to fit exactly the situation that originally gave rise to the regulatory impulse, thereby giving enjoined speakers an especially informative delineation of the line between what officials regard as the permissible and the forbidden. As compared with the subsequent punishment regimes, the injunctive method of regulating speech should engender much less of that highly costly variant of self-censorship whereby speakers who prefer to steer wide of the danger zone forgo communicative activities that would not even be disapproved by the regulators. The greater awareness of legal restraints created by the personalized character of injunctions thus cuts both ways. It is questionable whether the net balance of self-censorship effects stemming from that greater awareness supports a presumption against the injunction as a method of regulating speech.

A similar analysis holds for permit denials. The existence

80. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); NAACP v. Button, 371 U.S. 415 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

81. Vagueness is problematic largely because persons potentially subject to regulation cannot be certain what activities are prohibited. The overbreadth doctrine has a vagueness component because if a prohibition covers many activities that are constitutionally protected it cannot be applied according to its full terms but rather must be applied more restrictively, an interpretative practice that is bound to leave persons guessing about what are the operative limits of the judicially "redrafted" prohibition. *See generally* the excellent primer on vagueness and overbreadth in W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL RIGHTS AND LIBERTIES 353-61 (5th ed. 1981).

of a licensing system does not guarantee that every would-be speaker will know about its requirements, no more than does the existence of a criminal prohibition or civil liability rule generate universal awareness. However, the category of potential self-censors consists only of persons who are aware of the permit requirement and possibly daunted by it. The phenomenon of personalization is likely to affect such persons in conflicting ways so far as greater awareness is concerned.

On the one hand, the experience of having a permit application rejected by an administrative official or panel tells a would-be speaker that the civil authorities disapprove of the proposed communication and will seek to prevent its occurrence. On the other hand, a license is a kind of passport; the possibility of receiving a license, if only by virtue of a court order, might encourage some persons to pursue controversial expressive ventures they would not risk in the absence of some form of immunity from subsequent punishment. Moreover, rejected applicants often are told how to modify their plans in order to achieve official indulgence; speakers seldom possess that reassuring awareness under systems of subsequent punishment.

Thus, as with injunctions, it seems unlikely that the informing function of licensing systems engenders more self-censorship than it prevents. If anything, since the issuance of a permit grants speakers more of an immunity from prosecution than does the negative inference created by the outer boundary of an injunction, there is even more reason in the case of licensing systems to regard the net effect of the awareness factor as emboldening to speakers rather than inhibiting.

A second consequence of personalization that may induce self-censorship is the high probability that a violation of a personalized prohibition against speaking will be prosecuted. Such a high probability should make some speakers engage in that form of self-censorship that consists of steering far wide of the danger zone by resolving all interpretive doubts in favor of the broadest possible view of the prohibition. A high likelihood of prosecution should not, however, deter potential speakers from bringing motions to vacate injunctions or from seeking to have permit denials overturned in court. In fact, persons who know they will be prosecuted if they speak, and know they will be barred from raising constitutional defenses in such a prosecution, should be spurred somewhat by that knowledge to seek

anticipatory relief. The only form of self-censorship that need concern us, therefore, is that of the "steering wide" variety.

Two aspects of personalization increase the likelihood that violations of injunctions will be prosecuted. First, prosecuting authorities may feel that they have already committed themselves regarding the particular communicative activities that have been enjoined. Any arguable violation of the injunction may be viewed by the general public as a challenge to judicial authority. A firm response may seem imperative simply as a matter of maintaining credibility, quite independent of whether the activity in question caused any harm. Second, precisely because the command of the prohibition on speaking is stated in personal terms and defiance would raise symbolic concerns, the issuance of an injunction may cause enforcement authorities to pay special attention to the enjoined speakers. Apart from any official predisposition to prosecute, the mere fact of heightened scrutiny increases the likelihood that the authorities will learn about prohibited actions on the part of speakers, a separate element affecting the odds of prosecution. Enjoined speakers who perceive a high risk of prosecution on either of these accounts are likely to steer wide of the danger zone in interpreting the prohibitions contained in an injunction.

It is significant, however, that the only type of self-censorship that may be affected by the increased risk of prosecution depends on the speaker's uncertainty regarding the exact scope of the prohibition. Precisely because of their personalized nature, injunctions can be drawn to minimize this uncertainty. In this regard, the self-censorship danger stemming from the likelihood of prosecution, while by no means negligible, is not necessarily endemic to the injunctive procedure as such, and thus should not figure prominently in a theory of prior restraint.

In the case of licensing systems, the likelihood of prosecution due to personalization should not be a factor inducing self-censorship. The "steering wide" phenomenon, the only variety of self-censorship that might be affected by an increase in the likelihood of prosecution, seems not to be a consideration for licensing systems. In this context, the obligation of speakers is not to obey a possibly ambiguous prohibition, but rather to secure unambiguous official approval for a particular activity. Potential speakers who are influenced by the perception that any violations of the prohibition on speaking will surely be noticed and prosecuted should be no less likely on that account to engage in constitutionally protected expression. For the only way

speakers can engage in such expression is by securing the required permit, a procedure free from ambiguity precisely because of its personalized nature. Communicative activities undertaken in defiance of permit requirements may not always warrant prosecution, but such expression should not be considered constitutionally protected for purposes of a self-censorship analysis.

Thus, the impact on prosecutorial practices that may stem from the personalized character of injunctions and permit denials would seem not to be an important source of self-censorship. An increased likelihood of prosecution is highly plausible in both regimes, but the only type of self-censorship that is likely to result thereby should not be a major concern due to other features of the injunctive and licensing processes.

Finally, the personalized nature of the prior forms of regulation may induce self-censorship simply as a matter of mystique. Certainly injunctions appear to have in the minds of many citizens a mystique that engenders compliance. Potential speakers who would think nothing of violating criminal laws in order to test their constitutionality or even as exercises in civil disobedience are reluctant to disobey injunctions. The personalized nature of the law's command seems to cast a spell.

It is important, but difficult, to distinguish this factor of mystique from the other considerations that have been discussed. Speakers who comply more readily with injunctions than with criminal prohibitions may not know in their own minds why they behave that way. Injunctions may have a mystique largely because they raise the awareness levels of speakers, or because the high likelihood of expeditious prosecution enhances respect for the law. In the one area where violations of injunctions routinely are not prosecuted, public employee strikes, no mystique seems to operate; persons who have a considerable occupational stake in the rule of law defy injunctions with regularity and seeming ease.[82]

Despite the acute difficulty of untangling the many strands of behavioral motivation, there is impressionistic evidence to support the claim that injunctions have a special mystique. In the controversy over the Pentagon Papers, for example, the *New York Times* published classified documents in the face of threats of criminal prosecution, but stated that it would obey

82. *See, e.g.*, the empirical study reported in Douglas, *The Labor Injunction: Enjoining Public Sector Strikes in New York*, 31 LAB. L.J., 340 (1980).

an injunction against publication.[83] *The Progressive* magazine sat on its bombshell story for months until an injunction was lifted.[84] Taft-Hartley injunctions appear in some contexts to have an almost unaccountable behavioral impact on strikers, despite the controversial history of the injunction in labor relations.[85] Perhaps the mystique traces not simply to the fact that would-be violators are identified by name, but also to the perception that the injunction is the government's ultimate plea for cooperation, defiance of which assumes the dimensions of a revolutionary act. This consideration should be especially important to protestors seeking to appeal to public opinion. It may also be significant that the violation of an injunction challenges the authority of the courts rather than the executive and legislative branches. Those who view the judiciary as the protector of minorities or the central bulwark against abuses of official power should have mixed emotions about nibbling at the foundations of judicial authority. The phenomenon of personalization thus may not be the only reason why injunctions have a mystique. Whatever the forces that contribute to the effect, however, it would be hard to deny that injunctions often seem to induce obedience that cannot be explained fully by Holmes's bad man theory of law.[86]

Obedience is not synonymous with the self-censorship of protected expression, however. Speakers who are influenced by the mystique of an injunction to file a motion to vacate rather than engage in unauthorized self-help should not be considered self-censors. In the examples cited above, the "compliance" of the *New York Times* and *The Progressive* took the form of eschewing self-help while pursuing motions to vacate. These publications "censored" themselves from being civil disobedients, but not from being first amendment speakers. Civil disobedience may properly figure in a theory of prior restraint, a question to be discussed in a subsequent section,[87] but the concept of self-censorship that has played such a prominent

83. *See* O. FISS, *supra* note 13, at 71.

84. *See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979); Knoll, *Born Secret—The Story Behind the H-bomb Article We're Not Allowed to Print*, THE PROGRESSIVE, May 1979, at 12. *See generally* H. MORLAND, THE SECRET THAT EXPLODED (1981).

85. *See* LEGISLATIVE REFERENCE SERVICE OF THE LIBRARY OF CONGRESS, FEDERAL LEGISLATION TO END STRIKES: A DOCUMENTARY HISTORY 575-609 (1967).

86. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920).

87. *See* text accompanying notes 135-36 *infra*.

role in modern first amendment doctrine extends only to the loss of communications that are constitutionally protected. On occasion, acts of civil disobedience can have social utility, but by definition they cannot enjoy constitutional protection. The mystique of injunctions thus can figure in the present analysis only if that mystique induces persons to steer excessively wide of the terms of a prohibition or not to pursue opportunitites to vacate or modify it.

On this score, it is not clear that injunctions possess a behavior-modifying mystique. Mystique, if it exists at all as an independent force, has impact largely by inducing respect for law. There is nothing disrespectful about filing a motion to vacate; if anything, such an act signals the highest respect for law, much more so than a resentful or fatalistic abandonment of plans to speak. Moreover, a person under injunction who proceeds to speak because he believes or hopes that his particular communication is not prohibited by the terms of the restraint is not being disrespectful of law. Self-help is the authorized procedure for testing the limits, though not the constitutional validity, of an injunction. It can be a risky procedure, so considerations such as the likelihood of prosecution ought to affect the behavior of speakers in this respect. But there is no reason why the mystique phenomenon should play a role at this point in the process. Thus, despite the strong intuitive sense that injunctions have a special mystique due in part to personalization, it is unlikely that a significant quantity of self-censorship of protected expression results from that mystique.

In the case of licensing systems, the mystique phenomenon appears to play no role whatever. Permit denials may be personalized in character, but in our legal culture they carry no mystique. It is inconceivable that an applicant who is denied a permit should fail to challenge that denial in court out of some special regard for the decision or authority of the licensing officials. Like the other possible consequences of personalization discussed in this subsection, mystique is not, it would seem, an important source of self-censorship in either system of prior regulation.

E. Expeditious Enforcement

Injunctions are enforced by means of a uniquely expeditious procedure: contempt of court. In contrast, licensing systems, criminal prohibitions, and civil liability rules are enforced according to the normal procedures and timetables of the civil

and criminal courts. The common perception that violations of injunctions can be more swiftly and surely punished than other types of violations may induce enjoined speakers to censor themselves in certain ways. Such a possibility needs to be considered even though licensing systems, which are enforced by standard criminal prosecutions for speaking without the required permit, do not share this source of self-censorship. Since the concept of self-censorship is a common denominator in the analysis, we are comparing the sum total of predictable self-censorship for each regulatory method from all sources, including those unique to a particular method.

Do injunctions engender unusual self-censorship on account of the nature of their enforcement proceedings? A criminal prosecutor must contend with time-consuming screening and pretrial procedures, the beyond-reasonable-doubt standard of guilt, and, if the defendant chooses, the cumbersome and unpredictable phenomenon of jury trial. Punishment of violators by this method is seldom either swift or sure, a fact that will not be lost on at least some speakers who must decide whether to engage in arguably protected expression. Similarly, plaintiffs invoking civil liability rules against speakers typically encounter long docket delays and, in the case of libel litigation (the most common civil action relating to speech), special burdens of proof that make recovery an uncertain and distant prospect.[88] In contrast, prosecutions for contempt of court are usually instituted and consummated within a short period after the alleged violation takes place. By tradition, moreover, contempt proceedings are streamlined, with the judge (who has ruled against the speakers at the issuance stage and who may have instigated the prosecution) not always assuming the role of an impartial arbiter.[89] The swiftness and sureness of sanctions, not to mention the unpleasantness of the enforcement proceedings themselves, would seem to be factors that should influence the behavior of potential speakers.

The differences between the various enforcement procedures can be overstated, however. The only type of contempt proceeding for which the collateral bar rule is applicable is

88. Proof of fault on the part of the defendant must be by clear and convincing evidence. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283-92 (1964). In addition, summary judgment is frequently granted to protect defendants from the burden of litigation.

89. *See* O. Fiss, *supra* note 13, at 30-31, 50.

criminal contempt,[90] and most of the safeguards of the Bill of Rights apply to criminal contempt prosecutions. The presumption of innocence operates, proof of guilt must be beyond a reasonable doubt, defendants may not be compelled to serve as witnesses against themselves, and the rule against double jeopardy applies.[91] Should the punishment be six months or more, defendants enjoy the right to a trial by jury.[92] If the presiding judge (who typically issued the injunction) can be shown to be biased, the defendants are entitled to have a different judge.[93] The most striking differences between criminal prosecutions and criminal contempt proceedings appear to be two: (1) the much shorter lead time in the contempt procedure between the alleged violation and the determination of guilt or innocence; and (2) the greater possibility in contempt proceedings that judges whose behavior is not so outrageous as to justify their removal from the case will nonetheless be predisposed against the defendant. Given the existence of appeals, which often provide a justification for sanctions being stayed and which can check or countermand some instances of biased judging, it is questionable whether many speakers are adversely affected by the distinctive features of contempt procedures.

Whatever the objective reality may be, it is the perceptions of would-be speakers concerning that reality that determine the level of self-censorship. So long as contempt proceedings are commonly perceived as Draconian, speakers can be expected to censor themselves more severely when contempt is one of the sanctions at the disposal of the regulatory authorities. Here again, however, it is important to be specific about the types of self-censorship that must be assessed. If one assumes the applicability and validity of the collateral bar rule, as I do by hypothesis at this stage of the analysis, it should be of no concern whether speakers are deterred by the fear of an expeditious contempt proceeding from resorting to self-help in the face of a prohibitory injunction. That remedy is not available to them. The self-censorship effects that properly may be counted as a cost relate to other patterns of behavior: the abandonment of plans to speak due to the mere threat of an in-

90. *See, e.g., In re* Bradley, 318 U.S. 50 (1943); United States v. Spectro Foods Corp., 544 F.2d 1175, 1182 (3d Cir. 1976).

91. *In re* Bradley, 318 U.S. 50 (1943); Michaelson v. United States, 266 U.S. 42 (1924); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

92. Bloom v. Illinois, 391 U.S. 194 (1968).

93. *See* Mayberry v. Pennsylvania, 400 U.S. 455 (1971); D. DOBBS, *supra* note 53, at 96.

junction, failure to exploit procedures for lifting or modifying the injunction, and excessive caution in interpreting the scope of the prohibition contained in the injunction.

It seems plausible that on occasion persons are deterred from engaging in communicative activities by threats from the government or private parties to seek an injunction against the planned communication. A threat of this sort can be expected to have a special impact if it contains the assertion that failure on the part of the putative speakers to abandon their plans could result in their being behind bars within a matter of days. At present, there is no reason to believe that threats to enjoin speech are issued frequently enough to have much of a quantitative impact on self-censorship. Should the enjoining of speech become a more commonplace phenomenon, however, threats of swift, expeditious contempt proceedings could seriously affect the overall level of self-censorship. Since I believe worst-case scenarios should figure prominently in first amendment analysis,[94] I regard the expeditious enforcement procedures for injunctions as problematic on this account.

One must ask, however, whether injunctions are any worse on the score of threat potential than the subsequent punishment regimes. Law enforcement officials may not be able to exploit the factor of immediacy by frightening potential speakers with credible threats of imminent criminal *convictions*, but threats of imminent *arrests* ought to have considerable impact. Such threats should have the highest credibility because their implementation is fully in the hands of the prosecutorial authorities and does not depend, as is the case with threats of contempt convictions, on judicial acquiescence. It would seem, therefore, that the expeditious nature of their enforcement procedures does not distinguish injunctions from criminal prohibitions so far as the likely impact of threats at the earliest stages of the regulatory process is concerned.

Might not the phenomenon of expeditious enforcement affect the behavior of speakers at the next stage of the process, when the injunction actually is issued? At this stage, the possibility of a swift prosecution for contempt takes on a more concrete quality. The nature of the enforcement proceedings might have considerable impact on speakers if the threat of an actual prosecution is immediate and real.

The expeditious nature of contempt proceedings should not deter enjoined speakers from moving to vacate or modify in-

94. *See* Blasi, note 65 *supra*.

junctions. The vivid threat of swift conviction if unauthorized self-help is attempted makes such anticipatory litigation more imperative for speakers but no more burdensome. If anything, the immediacy of the threat of sanctions should act as a spur to speakers to consider their legal options, including the possibility of a motion to vacate, all the more carefully.

On the other hand, self-censorship of the "steering wide" sort could result if enjoined speakers, intimidated by the spectre of immediate sanctions, decided to comport themselves so that by no stretch of the interpretive imagination could their conduct be considered a violation of the terms of the injunction. This variety of self-censorship seems a likely consequence of the expeditious nature of contempt procedures so long as enjoined speakers remain in some doubt regarding just what activities are prohibited. Since injunctions have the potential, however, for minimizing that doubt by virtue of their personalized quality, the self-censorship toll from this quarter need not be heavy. Moreover, the proper antidote for any self-censorship of the steering-wide variety that injunctions might cause would seem to be a strict void-for-vagueness doctrine rather than a comprehensive presumption against the injunctive form of regulation.

F. Conclusion

I have examined five different sources of self-censorship and have made some speculative judgments regarding the importance of each under the various major methods of speech regulation. It is time to return to the ultimate question relating to self-censorship as a rationale for prior restraint doctrine: do licensing systems and injunctions that are governed by the collateral bar rule have in common the tendency to engender significantly more self-censorship than criminal prohibitions and civil liability rules? My answer is no. I do not believe the sources of self-censorship identified in the preceding analysis are likely, in general, to have more of an inhibiting effect on potential speakers than the sources of self-censorship that are distinctive to the subsequent punishment regimes.

Criminal prohibitions and civil liability rules often leave potential speakers uncertain about what they can say with impunity. Generalized prohibitions almost always contain inherent ambiguities that even strict due process doctrines must tolerate. More importantly, traditional doctrines of fair notice in criminal cases and fault in civil actions require at most that

defendants be informed about their statutory and common-law obligations, not the limits of their constitutional rights. Under the subsequent punishment regimes, the prescribed procedure for having one's rights adjudicated is to engage in the prohibited activity, risking incarceration, fine, or liability in damages should the constitutional judgment be adverse. Were declaratory judgments and injunctions against prosecution and civil suit more readily available, this source of uncertainty could be minimized. One thoughtful commentator has even argued that prospective speakers should perhaps enjoy a first amendment right to such anticipatory remedies.[95] Until such an innovative right is recognized, however, or advance definitive rulings become available without constitutional compulsion, a considerable amount of self-censorship can be expected in the subsequent punishment regimes due to the uncertainties inherent in their procedures. Injunctions and licensing systems are far less problematic on this score because under those regimes the definitive adjudications take place before the speakers must decide whether or not to engage in the disputed communicative activities.

I am also inclined to give weight to the factor of severity of sanctions. Even though sentences for contempt of court and speaking without a permit can be substantial, both types of offenses typically are punished lightly. Perhaps sentencing patterns are influenced to some extent by the fact that the defendants are often persons whose communicative activities would not warrant prosecution but for the need to make credible the prohibition on self-help. Whatever the cause, if sanctions tend to be more severe under subsequent punishment systems, self-censorship should be more pronounced as a result.

In light of the ways in which subsequent punishments may cause *more* self-censorship than the prior methods of regulation, the case for building a theory of prior restraint on the self-censorship rationale depends on identifying some distinctive features of injunctions and licensing systems that can be expected to cause large amounts of self-censorship. I have considered several characteristics of injunctions and licensing systems that might be supposed to engender self-censorship, but on examination only two, the burden of initiative and delay, can be said in net effect to impose serious and distinctive self-

95. *See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 543-51 (1970).

censorship costs in certain contexts. Moreover, for both the burden of initiative and delay, the predictable self-censorship effects are confined to either a relatively narrow class of potential speakers or to a worst-case scenario that depends on a major alteration of current regulatory patterns. Neither of those dangers of self-censorship should be dismissed as negligible, but for purposes of comparison they would seem not to outweigh the self-censorship risks that derive from the greater uncertainties and more severe sanctions of the subsequent punishment regimes.

V. ADJUDICATION IN THE ABSTRACT

If the common denominator of self-censorship is not a basis for a general presumption against licensing systems and injunctions, we must look to other features shared by the two methods of speech regulation. One phenomenon common to licensing systems and injunctions governed by the collateral bar rule is what might be termed adjudication in the abstract. Under both systems, the final authoritative judicial decision regarding the legal status of a disputed communication takes place before the moment of initial dissemination. That typically is not true under the subsequent punishment regimes.

When adjudication precedes initial dissemination, the communication cannot be judged by its actual consequences or public reception. The adjudicative assessment of speech value versus social harm must be made in the abstract, based on speculation or generalizations embodied in presumptions. That decisional limitation can affect the substance of the judicial decision in at least four ways that might be detrimental to the claims put forth by speakers.

First, if the governing first amendment test for the speech at issue is one that turns on consequences (clear and present danger, for example), the necessity for speculation permits groundless fears to figure in the rationale for suppression. If the judgment were made at a later stage, the data from initial dissemination could on occasion serve to dispel such fears. The distorting influence of groundless fears is likely to be compounded, moreover, in disputes over such matters as diplomatic and military secrets and street demonstrations, when the government may have control over the only witnesses who possess the information and expertise required to speculate intelli-

gently about the dangers.[96]

No doubt on occasion the need to speculate regarding the impact of the speech will work to the advantage of first amendment claimants: communicative activities that might have seemed harmless in the abstract will sometimes generate consequences that provide a rationale for holding the speakers civilly or criminally liable. A central tenet of modern first amendment theory, however, is that under conditions of uncertainty regarding consequences, both regulatory officials and judges tend to overestimate the dangers of controversial speech.[97] Unless that tenet is to be abandoned, it makes sense to consider the net effect of adjudication before initial dissemination to be detrimental to speakers so far as the assessment of dangers is concerned.

This objection to adjudication in the abstract does not apply when the first amendment test is based on the intrinsic character of the speech rather than its particular consequences (for example, the current doctrines regarding obscenity and fighting words).[98] Even if the "intrinsic character" of speech categories is determined largely on the basis of generalizations about the normal consequences of the various communications that fall within each category, once the generalization is adopted there is no further assessment based on the consequences in individual cases. It should not matter, therefore, so far as the factor of groundless fears is concerned, whether adjudication under an intrinsic character standard precedes or follows the expressive event. Such intrinsic character standards are rare and much criticized, however.[99] If the need to accommodate prior regulation were to create pressures to adopt such standards in developing substantive doctrine, that dynamic should itself count as a reason for disfavoring licensing systems and injunctions.

Second, the dissemination of speech may create public opinion pressures that can exert a healthy influence on the for-

96. For accounts of the problems encountered by private parties seeking to contest government assertions regarding national security, see H. MORLAND, *supra* note 84, at 162-63; K. SALTER, THE PENTAGON PAPERS TRIAL 84, 117 (1975); S. UNGER, THE PAPERS AND THE PAPERS 171, 194-45 (1972).

97. The classic documentation of this point is contained in Z. CHAFEE, FREE SPEECH IN THE UNITED STATES *passim* (1942). *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 9-10 (1970).

98. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

99. *See, e.g.*, Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10-13 18-19.

mulation and application of first amendment standards. How warmly one responds to this consideration depends on attitudes regarding judicial independence, the autonomy of legal reasoning, and the like. In the realm of civil liberties, moreover, it is not always the case that the force of public opinion aids the cause of freedom. Nevertheless, there will be some cases, particularly those involving exposés of governmental abuse, where judges inclined to suppress speech would be constrained by public opinion if the populace could be made aware of the contents of the speech in dispute. Seldom will such public awareness generate political and social pressures to suppress speech that are not already felt or anticipated by judges who must decide first amendment disputes.

Third, once a communication is disseminated it becomes to some extent a *fait accompli*. The world is a slightly different place; perceptions regarding what is tolerable are altered. Not only can the effects of the speech not be undone, views regarding the desirability of those effects will be influenced by the common human tendency to find virtue in the status quo. This phenomenon too may influence the formulation and application of doctrine in the direction of permitting more speech.

Finally, a judge's determination whether speech is constitutionally protected is likely to be influenced by the fact that, in the case of adjudication before dissemination, a permissive decision can result in the judge being held responsible for any adverse consequences that ensue from the expressive activity. If a protest march disintegrates into a riot, the judge who ordered the issuance of the parade permit will be criticized. If the publication of a book the CIA tried unsuccessfully to enjoin should result in the assassination of a covert agent, the judge who denied the injunction will be held responsible. One could argue that this is nothing more than the prospective accountability that most other decision makers must endure. In the realm of judicial interpretation of the first amendment, however, the caution inducing constraints that bind bureaucrats and politicians may be viewed as undesirable.

This last observation introduces a theme of general significance. That public opinion pressures, the *fait accompli* phenomenon, and the absence of prospective accountability may sometimes expand the ambit of protected speech need not be considered an argument against adjudication in the abstract. These considerations could be viewed as distorting influences that might cause substantive first amendment standards to de-

viate, in the direction of protecting too much speech, from the optimal formulation that would be arrived at by a balanced assessment of competing values. In the same vein, one could even argue that data concerning the initial consequences of a communication may distort judgment regarding what were the actual dangers generated by the communication. Dangers that never materialize into harms are dangers nonetheless, the creation of which can be considered a culpable, or at least prohibitable, act. In short, it is not obvious that the dynamics of subsequent punishment should be preferred simply because unforeseen events or common psychological propensities often make speakers appear less dangerous after the fact.

The case for preferring subsequent punishment regimes on this account rests on some basic, though not incontrovertible, notions regarding first amendment adjudication in general. One such notion is that judges tend to be unduly risk averse in ruling upon the claims of speakers. Among those scholars whose professional interests encompass the practical dynamics of doctrinal development, Chafee, Kalven, and Emerson have made the most enduring contributions to first amendment theory. Each of these observers was impressed by how patterns of inertia and conformity, and attitudes of fear, caution, and intolerance, affect the development of first amendment doctrine.[100] The various theories and recommendations for doctrinal reform put forth by Chafee, Kalven, and Emerson have in common the view that first amendment doctrines should be designed to minimize the impact of such constricting social and psychological factors. The debilitating effect of excessive caution is also a theme that permeates the eloquent opinions of Holmes and Brandeis, who urged us to view life as an experiment and to free ourselves from "the bondage of irrational fears."[101] If the need to counteract chronic risk-averse tendencies regarding the regulation of controversial speech is taken as one of the central considerations in the formulation of first amendment doctrine, a preference for the dynamics of subsequent punishment makes sense. The ideal of a "balanced assessment of competing values" is unlikely to be achieved in the sterile, caution-

100. *See* Z. CHAFEE, *supra* note 97, at 23-27, 60-79; T. EMERSON, *supra* note 97, at 9-14; Kalven, *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1, 32; Kalven, *supra* note 99, at 17.

101. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

inducing environment of adjudication prior to initial dissemination.

In addition to this desire to correct judicial risk aversion, the dynamics of subsequent punishment might be preferred because they shift the mode of decision making into essentially pragmatic channels. There may be something to be said for avoiding anything resembling an ideology of repression. Perhaps we should prefer that every occasion for the regulation of speech be a matter of practical necessity, an exceptional occasion, unique and particularistic. So long as first amendment doctrines are tempered by such practical considerations as the wisdom of hindsight, public opinion pressures, and the *fait accompli* phenomenon, the regulation of speech may never develop an expansive logic of its own. The chief virtue of Holmes's clear and present danger test may lie not so much in where it draws the line, but rather in its insistence that every case is to be judged in its unique factual context and viewed as a "matter of proximity and degree."[102] It is the cancer of tidy doctrine, feeding on its internal logic, that is most to be feared in the ultrahazardous realm of speech regulation. Adjudication in the abstract, for which reality testing is at a minimum, can be a breeding ground for tidy doctrine.

Finally, the dynamics of subsequent punishment tend to mitigate one of the disturbing paradoxes of any system of speech regulation that conditions liability on consequences: the fact that the more effective speakers are (or are likely to be) in influencing their audiences, the more certain they are to be punished (or prohibited from speaking). This paradox can never be escaped entirely, but under subsequent punishment regimes the factors of favorable public reception and the *fait accompli* phenomenon operate to the benefit of speakers who capture the favor of the public. It is also true that speakers who stir up their crowds more effectively than would have been predicted will suffer under a regime of subsequent punishment, but that phenomenon seems so exceptional that it should not count much in the analysis. On balance, speakers who prove to be persuasive and attractive are likely to fare better as a result of the regulatory dynamics of subsequent punishment. That consequence in itself may constitute a reason to consider those dynamics a positive good.

In sum, licensing systems and injunctions have in common the adjudication of disputes regarding controversial communi-

102. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

cations at a time prior to the initial dissemination of the speech in question. Such adjudication tends to have an abstract quality because courts are then insulated from some of the pragmatic considerations that influence adjudication under the subsequent punishment regimes. There are reasons, deriving from certain fundamental perspectives on the first amendment that are widely shared among modern theorists, for viewing those pragmatic influences as salutary. The common feature of adjudication in the abstract thus provides one reason for linking together licensing systems and injunctions at the center of a general theory of prior restraint.

VI. OVERUSE

So far we have examined how prior and subsequent systems of regulation compare in terms of their impact on potential speakers and on judges called upon to adjudicate the legal status of particular communications. Another dimension to consider is the impact of the various systems on the behavior of persons who seek to accomplish the suppression or sanctioning of speech. This is a diverse class of actors that includes legislators who work for speech-restrictive legislation, police officers who arrest speakers or try to deter speech by threats, licensing officials, prosecutors, and private persons who bring lawsuits against speakers. I shall refer to this group collectively as regulatory agents. It is possible that injunctive and licensing systems are undesirable simply because they tend in operation to be too fully utilized by regulatory agents—too often invoked to generate prohibitions that are too often enforced. If it is important that the regulation of speech be only an occasional, exceptional event, any system that tends by virtue of its efficiencies or internal dynamics to be either casually or pervasively employed may for that reason alone properly be saddled with an adverse presumption designed to ensure that the system is used only in isolated, compelling situations.

The argument from overuse for preferring the subsequent punishment regimes is rather curious. It depends on the proposition that the frequency and effectiveness with which various regulatory powers are invoked is a proper matter to consider in determining which powers are constitutionally valid. If a power is valid when used sparingly, why should it become invalid when used systematically? If we want only a few exceptionally harmful communications to be regulated, should not that rationing be achieved by defining very narrowly what speech is

unprotected against *any* form of regulation rather than by preferring the more inefficient and unsystematic methods of regulation?

Not necessarily. In one sense, all first amendment issues involve a tension between the gains to be expected from speech (transmission of knowledge, cathartic release, and so forth) and the social risks and costs associated with controversial communications (antisocial actions caused, misimpressions created, irritations engendered). The strength of the social interests supporting regulation depends to some extent on variables, such as the intensity preferences of persons who feel threatened by speech, that are more easily assessed by politically responsible or personally involved regulatory agents than by judges seeking to apply legal doctrines in a detached fashion. If the regulation of speech is made a costly, time consuming, even aggravating process, only the most highly motivated regulatory agents will persevere. The dedication of the regulatory agents who happen to be involved is by no means a perfect proxy for the severity of the harms caused by a particular communication. Nonetheless, a political culture that tends, due to the propensities toward risk aversion discussed in the preceding section, to prefer too much regulation of speech probably can be relied upon to produce persevering regulatory agents whenever a speech causes or threatens to cause truly serious social harms. In this regard, a doctrinal preference for cumbersome procedures erects a filter which can supplement the effort to identify by means of substantive standards the occasions when the social interests in regulating speech outweigh the various interests served by unfettered expression.

To this point, we have been assuming a basically healthy political culture, albeit one with certain dynamics that encourage overuse of the power to regulate speech. Under the view of first amendment theory that I hold, however, the pathological dimension must also be considered.[103] What happens if social or political forces cause a great upsurge in the propensity to regulate expression? We should, I think, prefer those systems of regulation that would perform best, in terms of preserving the constitutional commitment to free expression, under such stress.

From this perspective, the argument from overuse is more than merely coherent; it is important, even basic. No legal doctrine is likely to withstand a sea change in the attitudes of soci-

103. *See* Blasi, *supra* note 65.

ety regarding repression. Where doctrine can make a difference is in containing flash floods, those passing but potentially destructive moments in the history of nations when the veneer of rationality cracks and political discourse comes to be dominated by hysterical, xenophobic impulses and the wild imagery of demagogues. On such occasions, delays and other inefficiencies built into the procedures for regulating speech can give the forces of moderation valuable time to regain control.

An argument from overuse is thus not incongruous if one accepts either the pessimistic view of normal regulatory dynamics espoused by the leading first amendment theorists of modern times[104] or my own belief that pathological scenarios should figure prominently in the formulation of first amendment doctrine. It remains to be shown, however, that injunctions and licensing systems share, in comparison with the subsequent punishment regimes, a tendency to be overused.

Roughly speaking, regulatory systems are used in two ways: to generate specific prohibitions, and to enforce those prohibitions by means of sanctions. Thus, a licensing system generates specific prohibitions in the form of denials of permit applications, and an injunctive system generates specific injunctions. It is not quite so clear how a criminal statute should be classified; is it a system in its own right that generates specific prosecutorial warnings and charges, or is it a "specific" prohibition that is generated by the larger "system" of criminal law? If it is the latter, criminal statutes, although phrased in general terms, belong on the same plane for purposes of comparison as particularized injunctions and permit denials. A similar problem of classification pertains to civil liability rules.

In deciding which stages of the various regimes to compare, a dominant consideration should be when in each process the most significant discretionary judgments are made, for those are the decisions that determine how heavily a regulatory system is used. Licensing systems typically are established by statute, but the authorizing statutes usually give licensing officials wide scope to decide which communications to ban. The pivotal normative judgments in such systems occur when individual permit requests are ruled upon. This is true even though first amendment doctrines of vagueness, overbreadth, and undue delegation prohibit legislatures from setting up licensing regimes that are wholly devoid of standards.[105] Partly

104. *See* authorities cited in note 100 *supra*.

105. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969);

because lack of notice to speakers is not a problem in this context, and partly because licensing systems are regarded as most efficacious when the regulatory decision requires nonmechanical judgments by experienced, specialized decision makers, courts have not insisted that the substantive standards in licensing schemes be highly determinative of outcomes in individual cases. The import of Supreme Court doctrine in this regard has been to prevent licensing officials from operating in a standardless vacuum so as to check the possibility of gross abuses of discretion. That problem aside, administrative judgments in permit application cases remain highly discretionary in nature. Those judgments constitute the stage that most determines how heavily a licensing system will be used.

For injunctive systems as well, the pivotal judgments that establish the level of use occur when individual situations are ruled upon rather than when general standards are adopted. Although certain statutes vest special injunctive authority in courts and specify the standards to be applied in exercising that authority,[106] most injunctions prohibiting speech derive from broad judicial equity powers that rest on inherent court authority or content-neutral jurisdictional statutes.[107] The principal normative judgment is made at the stage when the specific injunction is issued.

In contrast, criminal statutes and civil liability rules almost always embody specific normative judgments regarding what kinds of communications should be permitted. Difficult questions of application can arise, of course, but the normative judgment that is made by a legislature or common-law court at the stage when the general standard is formulated typically represents the most significant choice in the system regarding how the trade-off between communicative benefits and social harms is to be resolved. In this regard, injunctions and permit denials seem more comparable to criminal statutes and civil liability

Staub v. Baxley, 355 U.S. 313 (1958); Kunz v. City of N.Y., 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Lovell v. Griffin, 303 U.S. 444 (1938).

106. The statute upheld in Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), is an example.

107. So far as the reports reveal, neither the injunction in Organization For a Better Austin v. Keefe, 402 U.S. 415 (1971), nor the pretrial order in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), were issued pursuant to statutory authority. The government's injunction action in New York Times Co. v. United States, 403 U.S. 713 (1971), was based on a claim of inherent executive authority.

rules than to particular criminal convictions and civil damage awards.

Apart from basic normative judgments concerning standards of legality, the most significant discretionary decisions in the different systems relate to levels of enforcement: whether to prosecute an apparent violation of the criminal law; whether to bring suit under a liability rule; whether to prosecute for contempt of court or for violation of a permit requirement. Discretionary judgments of this sort, as well as those made at later stages such as sentencing, concern the question how fully to enforce the basic value judgment embodied in the general criminal or civil standard, or the particular injunction or permit denial. Again, individual injunctions and permit denials function on a plane with criminal statutes and civil liability rules.

In assessing patterns of use, therefore, I compare the processes by which statutes are passed and common law doctrines are formulated under the subsequent punishment regimes with the processes by which particular injunctions are issued and particular permit applications are ruled upon. I compare criminal prosecutions and civil lawsuits with contempt proceedings and prosecutions for speaking without a required permit.

Injunctions are issued and permit applications are denied "by a stroke of the pen." In both cases, the process is expeditious. Certain procedures and evidentiary burdens limit how readily and pervasively those systems can be employed by regulatory agents, but checks of that sort do not fundamentally alter the essentially expeditious character of the prior regulatory regimes.

Under traditional principles of equity, regulatory agents who seek to enjoin speech normally must establish that "irreparable harm" is likely to ensue if the speech is not enjoined.[108] They must convince the court that "legal" remedies (subsequent punishments, in the main) will not adequately protect the social interests threatened by the speech.[109] But those are burdens of persuasion more than preparation; they are not likely to deter or seriously delay regulatory agents who desire to invoke legal authority to suppress speech. Were it not for the additional adverse presumption imposed by the doctrine of prior restraint, the swiftness and relatively streamlined nature of the procedures by which injunctions are issued could be ex-

108. *See generally* O. FISS, INJUNCTIONS 9-51 (1972).
109. *See* D. DOBBS, *supra* note 53, at 57-62, 108.

pected to attract regulatory agents in droves. Overuse of the power to regulate speech is likely under such conditions, particularly in light of the political gains some regulatory agents may achieve when the public's cry for suppression can be satisfied while emotions are still running high.

No special burden of persuasion, and in most cases not even a formal hearing, operates to check the suppressive stroke of the pen by a licensing official. Under *Freedman v. Maryland*, it is true, a permit denial can only be effectuated if the administrative authorities go to court and secure a judicial order.[110] The burden of persuasion in the judicial proceeding rests with the licensing officials who seek to suppress the speech. However, this burden is far from overwhelming. Licensing officials can be expected to develop expertise in bringing such cases to court.

Not only are there no major burdens to force licensing officials to make priority judgments, there may be bureaucratic dynamics that encourage casual, routine invocation of the power to regulate expression. Licensing officials typically are selected because of their knowledge and concern about the social interests the regulatory system is designed to protect—crowd control, for example, or conventional mores regarding sexual depiction. These officials can be expected to begin their chores with a predisposition to regulate expression.[111] The experience of ruling upon numerous permit applications, moreover, is hardly likely to heighten what little appreciation such persons may have for the value of free expression. When the phenomenon of prospective accountability is added to the calculus, it seems inevitable that regulatory impulses of low or intermediate intensity would be pursued by most licensing officials absent some sort of doctrinal check deriving from a theory of prior restraint.

Under the subsequent punishment regimes, in contrast, the process by which regulatory impulses are implemented is far more complicated, drawn out, and interlaced with disincentives. The passage of a criminal statute requires a majority vote in two separate representative bodies (except in Nebraska). The traditional practice of committee deliberation slows down the process and often provides an opportunity for political minorities (including proponents of strong speech rights) to kill or modify proposed legislation. The gubernatorial

110. *See* text accompanying notes 66-69 *supra*.
111. *See* authorities cited in note 50 *supra*.

veto constitutes an additional obstacle. The power to legislate against speech can certainly be abused, but usually only when the preferences of the political community run intensely in the direction of repression. Even then, the cumbersome nature of the legislative process makes it difficult for the regulatory forces to keep up with innovative, adaptive speakers such as pornographers. Injunctions and permit requirements, for which the basic substantive norms are formulated case by case, seem by comparison far more susceptible to both casual and comprehensive use.

A somewhat different set of constraints limits the regulatory uses to which common law liability rules can be put. As with an injunction, all it takes is one court decision to establish a common law doctrine that severely restricts the right to speak. In theory, a comprehensive regime of repression could be implemented by means of a few judicial opinions fashioning tort doctrines that authorize compensation for persons who are offended, embarrassed, or frightened by controversial communications. Powerful common law traditions make this scenario highly unlikely, however, even in periods of hysteria. The process of common law development is by tradition gradual. Sweeping changes occur, to be sure, but usually only after extensive foreshadowing and testing in judicial dictum and academic commentary. Moreover, common law doctrines are supposed to be principled; specific results in cases are evaluated in large part according to their analogical consequences. Fleeting regulatory impulses, even those of an intense nature, are likely to be filtered out by these aspects of the common law tradition, as well as by the lengthy docket delays that plague civil litigation in many jurisdictions.

So far as the formulation of prohibitory norms is concerned, it would seem that the procedures and traditions of the subsequent punishment regimes provide fairly effective safeguards against too casual or pervasive a use of the power to regulate speech. By comparison, injunctive and licensing systems are particularly susceptible to being invoked in response to momentary public passions or political preferences that are not widely shared or deeply felt.

The various regulatory systems also exhibit differences in their enforcement procedures that can be expected to affect levels and patterns of use. Several forces combine to generate a logic of full enforcement of injunctions. Because of the personalized nature of the prohibition, the disobedience of an in-

junction takes on the character of defiance of the legal system itself. Symbolic considerations may dictate prosecution when material considerations alone would not. Even if officials might not regard a particular violation as serious, they may have difficulty pretending not to notice it because the personalized character of the proceedings at which injunctions are issued often places enjoinees in the public eye. In addition, the decision whether to charge speakers with contempt is often made by the judge who issued the injunction in the first place.[112] When performing a prosecutorial function, a judge can be considered a regulatory agent. Many judges who have issued injunctions may feel a personal stake in the enforcement of their orders, and may also feel emboldened in making prosecutorial decisions by the knowledge that they will preside over the contempt proceedings. The fact that a conviction for contempt can be had within a short time after a violation takes place also should tend to encourage prosecutions. Finally, the existence of the collateral bar rule means that regulatory agents need not worry that the speaker's first amendment defenses will abort or complicate a contempt prosecution. It is not surprising that there is no real tradition of prosecutorial discretion with regard to violations of injunctions.

Licensing systems are enforced by means of regular criminal prosecutions. Many of the forces that generate a logic of full enforcement of injunctions thus do not operate in the context of licensing: the promulgator of the legal norm does not make the enforcement decision, the lead time between violation and conviction is no shorter than for other types of criminal cases, and a tradition of prosecutorial discretion operates. Two factors suggest, however, that permit requirements are likely to be enforced more frequently than most other laws regulating speech.

First, the equivalent of a partial collateral bar rule governs prosecutions for speaking without a required permit. Defendants are permitted to contend that the licensing law is unconstitutional on its face, but not that the permit denial in their particular case was a violation of the first amendment.[113] So long as the licensing system as a whole is not invalid, the prosecution of persons who speak in the face of a permit denial or who ignore the permit process entirely is generally a pro forma matter. All the prosecutor must establish is that the activity

112. *See* O. FISS, *supra* note 13, at 30-31.
113. Poulos v. New Hampshire, 345 U.S. 395 (1953).

engaged in by the defendants falls within the category of acts for which a permit is required. The prosecution of permit violations ordinarily requires little investigation or preparation by the district attorney's office. A high conviction rate can be anticipated. The prospect of success can function as a spur to prosecution.

Second, symbolic considerations should engender a propensity to prosecute permit violations. When a permit is actually sought and denied, a decision by the rejected applicant to proceed anyway with the proposed speech takes on the character of direct defiance, at least as much as does the violation of an injunction. Speakers who never even apply for a permit may not be defiant in quite so vivid a way, but if they are not prosecuted the future credibility of the permit requirement may suffer. Although the failure to prosecute any crime can affect its credibility as a deterrent, the fact that the obligation to apply for a permit is a formal, usually unambiguous and simple, requirement makes the exercise of prosecutorial discretion regarding permit violations a particularly stark example of condoning inexcusable lawlessness. For most other speech crimes, in contrast, the decision not to prosecute can be attributed to the possibility of valid defenses or extenuating circumstances. Furthermore, speakers who have subjected themselves to the delays and inconveniences of the permit process may feel mistreated if other speakers are allowed to escape those burdens.

The several factors that encourage full enforcement of injunctive prohibitions and permit requirements would seem not to be counterbalanced by any comparable factors that are peculiar to the subsequent punishment regimes. I can think of only two considerations that might enhance the propensity to invoke subsequent sanctions. The first is the fact that violations of civil liability rules are "prosecuted" by private parties seeking personal gain rather than experienced officials sworn to uphold the common good. Such private enforcers do not have to make priority judgments regarding which unlawful activities pose the most serious threats to the social order. Petty, vindictive enforcement efforts can be expected. The very fact that private "prosecutions" are uncoordinated, however, reduces their capacity to serve as efficient instruments of systematic repression. In addition, docket delays, ignorance concerning legal rights, inexperience, and litigation expenses (despite the contingent fee system) are all factors that should reduce the incidence of civil liability actions against speakers. On balance, the

phenomenon of private enforcement would seem to pose no special threat of overuse of the power to regulate expression.

Second, a regulatory agent who would like to enforce a prohibition on speaking may be deterred from bringing suit by the prospect of a jury trial, which can be time consuming and also a source of popular check on excessive enforcement of speech-restrictive legal norms. Speakers are guaranteed a jury trial by the Federal Constitution in contempt proceedings, criminal prosecutions to enforce permit requirements, and criminal prosecutions generally, but not in civil actions.[114] The absence of the jury check could, in theory, contribute to the overuse of civil sanctions. However, all state constitutions guarantee civil defendants a jury trial.[115] If that safeguard were removed, moreover, it is possible that the first amendment would be read to require some such right in the case of civil actions against speakers, in libel and privacy litigation for example. Differences in theoretical jury trial rights in the various regimes, therefore, is no basis for viewing liability rules as problematic on the score of overenforcement.

To summarize, certain methods of speech regulation lend themselves more than others to frequent and pervasive use. It is not incongruous as a matter of first amendment theory to institutionalize a preference for sparing, selective use of the power to regulate expression. Both in the formulation and the enforcement of prohibitory norms, licensing and injunctive systems are likely to be used more heavily than the subsequent punishment systems. Such a tendency toward overuse unites licensing systems and injunctions in one respect that can figure prominently in a general theory of prior restraint.

VII. IMPACT ON AUDIENCE RECEPTION

In addition to its impact on speakers, judges, and regulatory agents, a system should be evaluated also in terms of how its distinctive features affect the way audiences receive the communications that take place notwithstanding the regulatory constraints imposed by the system. Although speech can serve a function even when no one is influenced by what is said, all major first amendment theories place a high value on the social process by which persons are persuaded by communications to change their moral and empirical beliefs. It should be a matter of doctrinal concern if certain laws or methods of regulation

114. 47 AM. JUR. *Jury* § 9 (2d ed. 1969).
115. *Id.* § 10.

cause audiences to shrink, or individual listeners to respond less intently (pro or con) to the speaker's message.

Licensing systems and injunctions governed by the collateral bar rule share the characteristic of providing an authoritative adjudication regarding the legality of a disputed communication before the moment of its initial dissemination. This phenomenon can have two effects that might be detrimental to audience reception of some communications that are determined to be constitutionally protected. First, the process of adjudication can delay dissemination of the speaker's message to a time when audience interest has waned or opportunities to act upon the speaker's advice have passed. We discussed the factor of delay in connection with self-censorship.[116] Here the concern is with delays that do not cause persons to abandon their plans to speak but nonetheless adversely affect how audiences receive the speeches that eventually are made. Second, even when delay is not a factor, audiences may react less intently, perhaps less spontaneously, when they know that the speech has already passed through a regulatory filter.

No one would deny that there are times when the impact of speech will be diminished if self-help is disallowed and both speakers and audiences are made to await the outcome of adjudication. The important questions for the present analysis are three: (1) What proportion of communications are affected by the limited delays imposed by the expeditious adjudication that characterizes modern injunctive and licensing systems? (2) When some adverse impact on audience reception can be traced to delay, how serious should that cost be regarded in light of the fact that the message ultimately gets into circulation? (3) Does the fact that delay can sometimes stimulate the interest of a potential audience offset the undoubted costs of delay on other occasions?

For some communications such as election-eve appeals to voters or nationally coordinated protest demonstrations, the importance of precise timing is obvious. On a broader front, newspapers chafe under delays of short duration not simply for fear of being scooped by the competition (a vanishing phenomenon in most localities), but also out of a desire that information about ongoing stories be disseminated when it can still shape the course of events. Even when the need for immediate communication is not obvious, moreover, the tactical preferences of speakers warrant consideration. We live, for better or

116. *See* section IV(B) *supra* at 30-32.

worse, in an electronic age characterized by such phenomena as sensory overload and diminishing attention spans. Professionals in the business of public opinion manipulation give great attention to matters of timing.[117] The fact that many speakers regard the nuances of timing as important is itself good evidence that audiences are affected, if only in ways that often cannot be documented, by even short delays. It would seem to be the exception, rather than the rule, when the adjudicative delays of a licensing or injunctive system have no impact on how the audience responds to the communication that eventually is disseminated.

We must ask, however, how costly in terms of first amendment values is the impact of delay in most situations. There is a tendency to assume uncritically that timing is of the essence for most communications. Yesterday's news is history; yesterday's protest is passé. Speakers may place such extraordinary emphasis on timing, but should first amendment theory?

As one who believes that a central function of free expression is to check the abuse of governmental power, my chief concern is that speech relating to the behavior of public officials be disseminated soon enough to permit a checking process to operate.[118] Sometimes a short delay in dissemination can permit government officials to present the public with a *fait accompli*. Military operations come to mind. Much of the time, however, the modest delays inherent in licensing and injunctive procedures will be inconsequential in terms of the long-run impact of a communication. Trial reporting is an example. I view with skepticism claims by news organizations that a few days delay in publishing reports about judicial proceedings can greatly impair the news value of what is published. No doubt a large segment of the public has little interest in stories that are not of the utmost topicality, but only at some stages of the checking process—as when a campaign against misbehavior becomes an ongoing story in its own right—is it essential to capture the attention of such persons. Moreover, important exposés regarding past events usually create their own topicality.

This is not to suggest that the costs of delay should be accorded little weight in comparing the different regulatory regimes. The checking value is not the only point of reference for

117. *See, e.g.*, L. BOGART, STRATEGY IN ADVERTISING 177-79 (1967); D. NIMMO, THE POLITICAL PERSUADERS 29-30, 55-56 (1970).

118. *See generally* Blasi, *supra* note 65.

interpreting the first amendment, and even that value is undercut occasionally by the kinds of delays that characterize licensing systems and injunctions. My only point is that the costs of delay are highly variable, and should not be uncritically assumed.

A further complication in the analysis derives from the fact that on occasion a well publicized delay can actually have a positive effect on the impact of a communication by whetting the appetite or arousing the curiosity of an audience. More persons probably read the Pentagon Papers as a result of the government's effort to enjoin them than would have done so had there been no such attempt and no resulting delay of publication. Millions of people learned about the existence and views of the American Nazi Party as a result of the protracted Skokie litigation.[119] It is no answer to say that if such delays were really advantageous to speakers, government officials would not institute the proceedings that create that effect. When a licensing or injunctive system is invoked against a speaker, the goal is to suppress the speech; if that goal is achieved, the delay will not intensify any audience reaction, for there will be none. Likewise, that aspiring speakers do not want to be enjoined or enmeshed in permit litigation does not mean that they do not enjoy the best of all worlds, in terms of audience response, on those occasions when they prevail in the litigation. The main reason speakers dislike delay-creating litigation is that they may lose. In assessing the impact delay has on audience reception of communications that ultimately are permitted by the legal system, the positive effects of delay would seem to be a major offsetting factor.

In general, it is doubtful that the net effect of delays of the duration common in licensing and injunctive systems is seriously detrimental to audience reaction in most instances. On some important occasions, however, even a short delay is likely to be devastating to the impact of a communication. In settling the legal status of whole methods of regulation, it is necessary to generalize about a highly diverse set of situations. Given that need, the narrow but occasionally severe impact of the delay factor should constitute a reason of intermediate impor-

119. *See generally* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir. 1978); Village of Skokie v. National Socialist Party, 69 Ill. 2d 605, 373 N.E. 2d 21 (1978).

tance for disfavoring the regimes that most often cause the dissemination of speech to be delayed.

The second major way in which the phenomenon of prior adjudication can affect audience reception is by influencing public expectations regarding a communication before the moment of its initial dissemination. Several distorting effects can be hypothesized.

First, audiences may wonder whether the communication that is transmitted represents the true message the speaker desired to convey. Did the speaker change a few passages in order to placate the censor or expedite the process of prior approval? Often there is no way to know, but doubts can infect the experience of reception. Consider the impact when a film begins with the message "edited for television." Throughout the film, the thought recurs, "What am I missing?" John Milton, in his polemic against censorship, *Areopagitica*, captures the essence of this objection to prior governmental evaluation of communications:

> And how can a man teach with authority, which is the life of teaching, how can he be a doctor in his book, as he ought to be, or else had better be silent, whenas all he teaches, all he delivers, is but under the tuition, under the correction, of his patriarchal licenser, to blot or alter what precisely accords not with the hidebound humor which he calls his judgment? When every acute reader, upon the first sight of a pedantic license, will be ready with these like words to ding the book a quoit's distance from him: "I hate a pupil teacher, I endure not an instructor that comes to me under the wardship of an overseeing fist, I know nothing of the licenser, but that I have his own hand here for his arrogance; who shall warrant me his judgment . . . ."[120]

Trust is essential to the relationship between speakers and their audiences, and the intervention of government prior to the moment of initial contact can disturb that trust.

Second, the granting of a license or the lifting of an injunction constitutes an official seal of approval, the modern day equivalent of an imprimatur. In a curious way, speeches that have such a characterization may lose some of their impact for that reason alone. The element of excitement that is present when a speaker presses a protest to the edge of legality, accepting the risk of criminal or civil sanctions, is absent. The whole event is safe. Sometimes dissident speakers will ask their audiences to risk the wrath of the authorities in order to accomplish certain political or social objectives. Those appeals

120. Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England*, in THE PORTABLE MILTON 151, 180 (D. Bush ed. 1949).

can have greater impact when the speakers, by virtue of the act of speaking itself, can be seen to practice what they preach. The uncertainty regarding legality that characterizes the subsequent punishment regimes may cause undesirable self-censorship,[121] but in terms of its impact on audience response to a communication, uncertainty may actually be a positive force.

Third, perceptions regarding a well publicized prior adjudication may displace in the public mind any reaction to the contents of the communication itself. Harrison Salisbury believes that although the litigation over the Pentagon Papers aroused intense public interest, the net effect of the *New York Times'* dramatic legal victory was to cause people to talk and think about the first amendment rather than the duplicity of the war-planners in the Kennedy and Johnson administrations.[122] A different adverse impact on audience reaction can occur when the drama of litigation engenders in the public mind exaggerated expectations regarding what the disputed communication must contain. When the genuine article finally sees the light of day, the communication may have less impact due to the defeat of those expectations than it would have had if the audience had been permitted to respond to it afresh.

The impact of prior adjudication is not always detrimental to speakers, however. Prior adjudication sometimes can make speakers into celebrities whose credibility with the public is enhanced by their newly acquired status. Furthermore, speech critical of government may seem more credible and more significant if, at the moment of initial dissemination, the government is on record as having tried to suppress it. In addition, audience sympathy for speakers on the first amendment issue can spill over to the substance of the message that ultimately is conveyed. It might be argued that these possibilities cut against the disfavoring of licensing systems and injunctions. The ideal from the standpoint of first amendment theory, however, should not be *favorable* reception of speeches but rather *undistorted* reception. That regimes of prior restraint tend on occasion to cause certain communications to have an unwarranted impact may itself constitute an argument for preferring alternative methods of regulation.

In short, prior adjudication erects a filter between speaker and audience. Even for the messages that pass through the filter, the communicative process is detrimentally affected by

121. *See* section IV(F) *supra* at 47-48.
122. H. SALISBURY, WITHOUT FEAR OR FAVOR 334-36 (1980).

the existence of such a barrier. The impact is difficult to document or predict, but under any theory that values speech largely for its capacity to influence listeners, this filtering phenomenon should be regarded as undesirable.

Under the subsequent punishment regimes, communications are neither delayed nor filtered. The only way in which audience reception might be adversely affected by subsequent methods of regulation is if listeners are themselves made to risk punishment for merely attending communicative events. Such a risk could cause audiences to dwindle. There have been occasions when local prosecutors have arrested viewers of pornographic films, but that practice has met with a chilly judicial reception.[123] Occasionally, observers of protest demonstrations may run the risk of being swept into the prosecutorial net should events get out of hand. But these are aberrational situations. In no systematic way does the possibility of civil or criminal sanctions interfere with the way an audience responds to a speaker's message.

Thus, because they share the feature of adjudication prior to initial dissemination, licensing systems and injunctions seem more likely than the subsequent punishment regimes to have an adverse impact on how audiences perceive communications that are protected under the first amendment. The case for linking licensing systems and injunctions at the center of a theory of prior restraint is made stronger by consideration of this dimension of audience reception.

VIII. UNACCEPTABLE PREMISES

To this point, we have evaluated the various methods of speech regulation exclusively in terms of their impact on the behavior of speakers, adjudicators, regulatory agents, and audiences. Behavioral impact is not, however, the only dimension that needs to be considered in determining whether a regulatory method should be disfavored under the first amendment. One function of a constitution is to preserve certain institutional structures and public attitudes relating to the concept of political authority. In particular, the Bill of Rights should be interpreted not only with an eye to the actors who have a stake in the litigation at hand, but also with regard for the entire political community's stake in preserving a certain desired alloca-

123. *See* Monaghan, *supra* note 95, at 539 & n.87. *See also* Bee See Books, Inc. v. Leary, 291 F. Supp. 622, 626 (S.D.N.Y. 1968).

tion of power between two vital abstract entities: the state and the individual citizen.

Regulatory procedures may distort that allocation if they are based on premises that are inconsistent with the philosophy of limited government that lies at the heart of the American constitutional tradition. To legitimate a procedure that embodies such objectionable premises is to weaken the coherence of the constitutional scheme, even when no undesirable behavioral effects can be ascribed to the operation of the procedure. The term "premises" in this regard embraces more than the underlying rationale for a method of regulation. A method with an unassailable rationale may in operation exhibit features that symbolically exalt the role of the state or demean the role of the individual. Symbolic statements of that kind can, if legitimated in constitutional adjudication, serve to erode the fragile set of attitudes and structures upon which the constitutional balance depends. Any analysis based on such abstract notions as underlying rationales and symbolic statements is bound to be elusive. Nevertheless, an inquiry that is restricted to the behavioral dimension ignores a vital part of the constitutional calculus. Premises are no less important because they are difficult to identify and assess.

Modern analysis of the problem of prior restraint tends not to pay much attention to the question of premises. That tendency was not exhibited by the greatest writer who ever addressed the subject of prior restraint. John Milton's *Areopagitica*, written in the form of a petition to the Long Parliament in 1644, remains the classic exposition on the evils of censorship.[124] Many of the arguments developed by Milton have been appropriated in the behavioral sections of the present analysis. Milton complained, for example, that ideas cannot fairly be judged before they are disseminated.[125] He objected to the cautiousness and insensitivity to learning likely to be displayed by the types of persons who would agree to assume the tedious chores of the censor.[126] He worried greatly about the stifling self-censorship effect of requiring an author to seek out the censor each time a new idea for a revision comes to mind.[127] He feared that audiences are likely to view a writing with skepticism when they cannot be sure that the version they

124. *See* Milton, *supra* note 120.
125. *Id.* at 162.
126. *Id.* at 176-77.
127. *Id.* at 179.

are permitted to read represents the true beliefs of the writer.[128] What strikes the modern reader most, however, upon returning to the *Areopagitica*, is the extent to which Milton's argument rests on his objection to the premises that underly the licensing of speech.

A theme that permeates the essay is the indignity of licensing due to the paternalism inherent in the procedure. In this view, comprehensive censorship is at odds with the conception of the proper relationship between citizen and state that underlays the Puritan revolution and is today a central premise of democratic theory. The key phenomenon appears to be trust. Licensing implies too much distrust of both writers and readers. A censorship system places the state in the role of a suspicious, omnipresent tutor. No system of political authority premised on the consent of the governed can admit the state to that role, whatever the behavioral consequences. The depth of Milton's conviction on this point is evident in several stirring passages:

> [S]o far to distrust the judgment and the honesty of one who hath but a common repute in learning, and never yet offended, as not to count him fit to print his mind without a tutor and examiner, lest he should drop a schism or something of corruption, is the greatest displeasure and indignity to a free and knowing spirit that can be put upon him.
>
> What advantage is it to be a man over it is to be a boy at school, if we have only scaped the ferula [paddle for spanking schoolboys] to come under the fescue [instructional pointer] of an Imprimatur; if serious and elaborate writings, as if they were no more than the theme of a grammar-lad under his pedagogue, must not be uttered without the cursory eyes of a temporizing and extemporizing licenser?
>
> . . . .
>
> . . . . Nor is it to the common people less than a reproach; for if we be so jealous over them as that we dare not trust them with an English pamphlet, what do we but censure them for a giddy, vicious, and ungrounded people, in such a sick and weak estate of faith and discretion as to be able to take nothing down but through the pipe of a licenser?[129]

In the licensing of speech Milton saw not only an unbecoming distrust of writers and audiences but also a demeaning of the very activity of self expression. To Milton, the process of writing out and publishing one's sentiments was an intensely personal and exalted endeavor. For this reason, he thought it far more objectionable for the state to inject itself into the midst of the process than to impose sanctions for the consequences engendered by the end product. One passage of the

128. *Id.* at 180.
129. *Id.* at 178, 182.

Areopagitica conveys better than any other how Milton's disdain for prior restraint derived from his belief in the special importance of written self expression:

> When a man writes to the world, he summons up all his reason and deliberation to assist him; he searches, meditates, is industrious, and likely consults and confers with his judicious friends; after all which done, he takes himself to be informed in what he writes, as well as any that writ before him. If in this, the most consummate act of his fidelity and ripeness, no years, no industry, no former proof of his abilities can bring him to that state of maturity as not to be still mistrusted and suspected (unless he carry all his considerate diligence, all his midnight watchings and expense of Palladian oil, to the hasty view of an unleisured licenser, perhaps much his younger, perhaps far his inferior in judgment, perhaps one who never knew the labor of book-writing), and if he be not repulsed or slighted, must appear in print like a puny with his guardian, and his censor's hand on the back of his title to be his bail and surety that he is no idiot or seducer; it cannot be but a dishonor and derogation to the author, to the book, to the privilege and dignity of learning.[130]

Milton was a creature of his times.[131] The speech he was concerned about, almost exclusively, was Protestant sectarian disputation. He did not believe in free speech for Roman Catholics or atheists.[132] The question for one who would draw upon Milton in thinking about the issues of today is whether the concerns relating to premises that he expressed in the *Areopagitica* retain significance in an age in which licensing systems are not comprehensive in scope, judgments to censor are not informed by the repressive traditions of Stuart England, the speech in dispute is not always in written form, and the ideas and information at issue do not, for the most part, relate to sectarian disputes over the fundamental tenets of religious faith.

The premise of distrust that so disturbed Milton would seem to underly modern licensing and injunction systems. The decision to adjudicate the legal status of speech in advance of its initial dissemination is almost always spurred by the belief that the public must be denied access entirely to the speech in question. So concerned is the legal system with how audiences might respond to the speech that the considerable advantages of retrospective adjudication are willingly sacrificed. The point of prior regulation is to suppress, not to sanction. Suppression represents a particularly active and absolute form of intervention by the state that would seem to reflect the view that nor-

130. *Id.* at 178-79.

131. The political context in which Milton wrote is discussed in C. HILL, MILTON AND THE ENGLISH REVOLUTION 149-60 (1977).

132. Milton, *supra* note 120, at 201.

mal, more limited corrective forces, including both the disincentives created by subsequent sanctioning systems and the good sense of the citizenry, cannot be relied upon to control sufficiently the harmful effects of certain communications. To find the normal corrective forces so inadequate to the task, one must distrust deeply the motives of speakers, the wisdom of audiences, or both.

It might be contended that there is good reason to distrust speakers and audiences, at least in certain contexts. The eighteenth century ideal of rational political man, if indeed it ever existed, has not survived the discoveries of modern psychology and the convulsions of twentieth century politics. Brandeis's dictum that "the fitting remedy for evil counsels is good ones"[133] rings hollow to an age that has seen demagogues destined to perpetrate unspeakable horrors use the facilities of mass communication to acquire and retain political power. The modern appreciation of human frailty may well support a premise of distrust regarding the capacity of audiences to handle certain ideas (incest, genocide, racial superiority, for example) and certain information (nuclear technology, intimate personal details). If distrust is not irrational, how can it be unconstitutional?

The answer is that in the kind of analysis we are presently engaged in, distrust is a comparative notion. The allocation of authority between the state and the individual is a function not simply of how much trust should be placed in the capacity of private individuals to process communications thoughtfully and responsibly. Distrust of the state, particularly in its censorial capacity, is a fundamental value that informs the first amendment. The decision to adjudicate the legal status of a communication before its initial dissemination embodies a premise of comparative distrust: better trust the regulatory process not to suppress salutary communications than trust the populace to reject or ignore unsalutary ones. To trust the censor more than the audience is to alter the relationship between state and citizen that is central to the philosophy of limited government.

If the objectionable feature of the distrust implicit in licensing and injunctive systems is simply this phenomenon of comparative distrust, one might question whether the premise of distrust is a basis for distinguishing prior from subsequent regulations of speech. Whenever subsequent sanctions are ad-

133. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

ministered in part out of a desire to deter future communications, implicit in the regulatory rationale is the belief that the public should not hear or read certain messages. Only first amendment absolutists completely eschew the premise of comparative distrust. All others believe that on occasion the regulatory process is more to be trusted than the good judgment of audiences, else why not let the speech proceed unhindered by mechanisms of deterrence?

That a premise of comparative distrust of speakers and audiences sometimes operates in the subsequent punishment regimes does not mean, however, that there are no distinctions to be drawn in this respect between prior and subsequent methods of regulation. Once again, the timing of adjudication in relation to the moment of initial dissemination figures prominently in the analysis. There are safety valves in the subsequent punishment systems that reflect both a distrust of the regulatory process and a respect for audiences. Many violations are not prosecuted. Adjudication draws on the benefits of hindsight in evaluating the character of particular communications. Audience reception may also be taken into account. Adjudicative judgments typically are rendered some months or even years after the moment of initial dissemination, which means the passage of time can allow long-range perspectives to override momentary suppressive passions. Audiences are not trusted completely; some communications are punished in order to decrease the likelihood that future audiences will be exposed to similar messages. But neither is the regulatory process fully trusted; a recognition of the potential for official error and shortsightedness permeates the design of the subsequent punishment procedures.

In contrast, licensing systems and injunctions do not exhibit such concern for the possibility of official error nor such respect for the judgment of audiences. The decision to settle the legal status of a communication before it is ever disseminated to the public is a bold, confident regulatory gesture. No need is felt to observe the actual consequences of the communication. Audience reception is deemed unimportant.

It may be objected that these features of the prior regulatory regimes do not result from a premise of comparative distrust of speakers and audiences but rather from the undeniable fact that certain types of communications can cause truly significant and irreparable harms no matter how responsibly most members of the audience behave. It takes only one terrorist to

misuse secret nuclear information, and one bluenose to cause a person to suffer because of his unorthodox personal life. Given that regrettable reality, on occasion the only sensible regulatory approach may be to suppress rather than sanction. So long as adjudication prior to initial dissemination is confined to situations in which the feared harm from a communication is especially difficult to accept or repair, the choice for prior regulation implies nothing about the trustworthiness as a general matter of either the regulatory process or the process of audience reception.

This point seems valid, but in fact it supports the conclusion that licensing systems and injunctions should be subject to an adverse presumption designed to restrict their use to exceptional situations. So long as prior regulation is reserved for instances of especially serious and irreparable harm, no premise of comparative distrust of speakers and audiences is implicit in the choice of a regulatory method. A premise of comparative distrust *would* be implicit, however, if the licensing and enjoining of speech were to be permitted whenever the case for some form of regulation was convincing.

The preceeding analysis rests on the assumption that when the legal status of a communication is adjudicated prior to the moment of initial dissemination, a judgment of illegality decreases the likelihood that the public will ever receive the communication. Only if advance judgments of illegality affect what messages audiences actually receive does it make sense to institute a system of prior adjudication in response to the perception that audiences cannot be trusted with certain controversial communications. Is it clear, however, that the phenomenon of advance adjudication in licensing and injunction cases has much effect on dissemination patterns relating to the communications that are judged to be illegal?

The universe of speakers who might wish to disseminate prohibited communications can be divided into three classes: (1) those who will disseminate their communication even when they know they will be punished in consequence; (2) those who will disseminate a communication they know to be prohibited only if they believe they somehow will escape punishment for that illegal act; and (3) those who are not willing to violate a legal prohibition and hence will abandon their effort to disseminate upon learning that their communication is prohibited. It would seem that speakers in the third category would be less likely to disseminate their messages under a regime of prior re-

straint than one of subsequent punishment because adjudication prior to initial dissemination removes all doubt about the legal status of the proposed communication, whereas the uncertainty inherent in systems of subsequent punishment enables such speakers to disseminate communications that may ultimately be ruled illegal. Speakers in the second category also would seem to be less likely to disseminate their messages when subject to licensing and injunctive systems because the higher levels of scrutiny and pressures toward full enforcement that characterize those systems[134] increase the probability that illegal communicative activities will be punished. Since many speakers who desire to disseminate prohibited communications will fall into either the second or third of the categories outlined above, there is every reason to believe that the phenomenon of prior adjudication will indeed affect dissemination patterns regarding communications that are held to be illegal. Thus, a preference for prior restraint would be a logical way to implement a desire, based on distrust of audiences, to keep those communications out of circulation entirely.

There remains the first category of speakers who desire to disseminate prohibited communications, those who are willing to accept punishment in order to have their messages reach the public. When these persons speak, they do so in the spirit of civil disobedience. The way a regulatory method treats civil disobedients can say much about its underlying premises regarding the allocation of authority between the state and the individual citizen. No regulatory system can be expected to legalize civil disobedience. That would amount to a contradiction in terms. But systems may differ regarding how much of an accommodation they make to the tactic of civil disobedience. A method of speech regulation that is designed to incapacitate civil disobedients, to exterminate the tactic of influencing audiences by the measured defiance of certain laws, might be thought improperly to exalt the authority of the state. It is not irrational under a theory of limited government to regard certain prohibited communications as valuable due to the checking function they serve, even while exacting a toll from those persons who disseminate them.[135] The rejection of civil disobedience as having no role to play in the political system can be viewed as one variety of excessive distrust of audiences. It is

134. *See* text accompanying notes 112-13 *supra*.

135. I have argued this point in another context. *See* Blasi, *supra* note 65, at 648. *See also* Kalven, *supra* note 2, at 34.

better, however, to treat the total rejection of civil disobedience as an unacceptable premise in its own right.

The subsequent punishment regimes accommodate civil disobedience by delaying the intervention of state authority until after the prohibited communication is disseminated. Protestors are permitted to speak now and pay later. Only when enforcement officials seek to incapacitate speakers, such as by seizing pamphlets or destroying presses, is the tactic of civil disobedience denied its rightful role in the checking process. Such incapacitating regulatory efforts are not unknown, but they are not the norm.

With regard to their impact on speakers, the prior regulatory regimes seem no worse in terms of accommodating civil disobedience. An adverse adjudication prior to initial dissemination does not incapacitate, and should not even deter, a civil disobedient. Speakers who are not averse to being punished should be no more reluctant to violate permit requirements or injunctions than criminal prohibitions. When the challenge to authority is at so fundamental a level, self-help becomes not a legal procedure dependent on legitimation by courts, but rather a physical act totally in the control of the speaker. Such factors as the collateral bar rule and the swiftness and sureness of punishment would seem not to matter. Owen Fiss has noted, in fact, that the injunctive form of regulation may actually facilitate civil disobedience because sanctions for contempt tend as a general matter not to be as severe as criminal sentences or civil damage awards.[136] Lawbreaker status can be achieved at a discount price.

These arguments only refute the claim that injunctions and licensing systems might deter or incapacitate persons from engaging in expression as a form of civil disobedience. There is another dimension to consider in assessing how the different regimes accommodate civil disobedience, the dimension of audience reception. It might be argued that civil disobedience loses much of its effectiveness when it is undertaken in the face of specific adjudicative judgments of illegality rather than the generalized prohibitions that criminal laws and civil liability rules represent. In the former context, the speakers may appear to the public like defiant outlaws, flouting civil authority in its ultimate guise, instead of legitimate participants in the familiar process of challenge by which laws are tested and enforcement levels settled upon. On the other hand, the greater

136. *See* O. FISS, *supra* note 13, at 72-73.

certainty of punishment under injunctive and licensing systems may be a source of audience appeal. Persons who disseminate communications in the face of particularized court orders are clearly prepared to pay a price in order to convey their beliefs. In contrast, protestors who openly violate criminal prohibitions may be betting on prosecutorial discretion. Moreover, if the illegality of the behavior is part of the message itself, as is the case with civil disobedience, the absence of uncertainty regarding legality should serve to intensify the communication.

On balance, licensing and injunctive systems do not appear to differ significantly from the subsequent punishment regimes in the matter of accommodating civil disobedience. If anything, it would seem that the prior methods of regulation are slighty more congenial to civil disobedience. It may even be that the availability of licensing and injunctive procedures is one factor that forestalls the widespread resort by officials to truly incapacitating, albeit unauthorized, methods of regulation such as seize-and-destroy tactics and the preventive detention of speakers. That civil disobedients arguably fare better as a result of the existence of the prior regulatory systems suggests, at a minimum, that those systems are not founded on the unacceptable premise that civil disobedience is an illegitimate (not just illegal) method of seeking to bring about political and social change.

A different troublesome premise that may be implicit in licensing and injunctive systems is that the act of speaking is an extraordinary endeavor that calls for especially active, comprehensive regulation by the state. For the proper balance of authority between state and citizen to be preserved, it may be important that the act of speaking, particularly the act of disseminating controversial communications critical of government, be considered a perfectly normal endeavor that calls for no special regulatory response. For government to treat the act of speaking as deviant or unusually dangerous is to sow the seeds of ideological conformity, and thereby to threaten the political authority of the individual.

Defenders of prior restraint may counter that many activities are enjoinable or subject to a permit requirement. If one must get a license to drive, build a home, practice a profession, or keep exotic animals, why not require a license to speak, at least where the act of speaking poses serious dangers or consumes public resources? If injunctions are available to prevent

a wide range of irreparable harms, why not use them to prevent the harmful effects of speech as well? In short, the decision to subject a particular activity to prior regulation need not be based, so the argument goes, on the premise that the activity in question is in any sense abnormal or disfavored.

The examples cited above suggest to me precisely the contrary. Many different kinds of endeavors may be subject to prior regulation, but they all have in common the quality of being perceived as potentially hazardous activities that require special standards of care or competence. A high percentage of the population is permitted to and does drive, but the intrusive nature of government regulation regarding the operation of motor vehicles serves as a constant reminder that this activity must be undertaken with particular caution and a high degree of conformity to social norms. The very fact that a showing of irreparable harm is a predicate for obtaining injunctive relief indicates that this form of government intervention is reserved for activities that are perceived as abnormally threatening to the social order.

Again, the response might be made that certain communications are indeed abnormally hazardous. Why deny an empirical reality? There may be good reason to do so. If social conformity is viewed as an omnipresent force that tends to distort public discourse,[137] it may be rational in fashioning first amendment doctrine to undervalue the actual risks posed by speech if the consequence of candid recognition and full valuation of those risks is to reinforce conformist attitudes. We have to treat controversial speech as a normal phenomenon, even though judged solely in terms of the risks it generates such speech might reasonably be thought to warrant special treatment. Only when the public views controversial speakers as normal people, with a legitimate role to play in the social system, can the fragile state-individual balance be maintained.

This point has force. Nevertheless, there is something disturbingly paternalistic about building first amendment doctrine around dubious empirical assertions for the ulterior purpose of shaping public attitudes toward speakers. Even if that course is rejected, however, the observation that speech sometimes can be hazardous does not mean that there is no unacceptable premise behind the decision to subject speakers to the same kinds of intrusive regulatory methods that are applied to persons who engage in such potentially hazardous or disruptive

137. *See* text accompanying note 100 *supra*.

activities as driving and building. A constitutional order founded on the consent of the governed perhaps can treat certain extraordinary communications as abnormal because of the unique dangers they pose, but it cannot coherently regard all or most (or even many) communications in that way. Such a constitutional order is committed to the accommodation, even facilitation, of social and political change, a process that often depends on the circulation of controversial communications. Once again, the notion of rationing comes into play. The occasional, infrequent use of prior restraint does not imply the premise that the act of speaking in general poses such threats to the social order that persons who engage in that act need to be supervised especially closely. The regular, systematic, frequent use of prior restraint implies just such an unacceptable premise.

Not only do regulatory methods embody premises regarding the role of controversial speech in the workings of the society as a whole, the choice of a regulatory method also reflects a view regarding the proper role of government in the process by which communications by private parties are formulated and disseminated. Respect by officials for the integrity of the communicative process is an essential attribute of limited government. In order for the power of the state to be kept in check, it is important that the concept of individual autonomy retain practical significance in the workings of the society. There have to be some important endeavors, relating to public as well as private objectives, that individuals are entitled to pursue by virtue of their status as individuals, and not by sufferance of the state. Communicating one's views, particularly with respect to public issues, would seem, in light of our constitutional tradition, to be one of the activities that belongs in this sphere of individual entitlement. And for that entitlement to reinforce the crucial, partly symbolic, concept of individual autonomy, a large measure of control over the details of the activity must remain in the hands of speakers.

One striking feature of licensing and injunctive systems is the ever present possibility, due to the phenomenon of adjudication prior to initial dissemination, that government officials may convince speakers to alter the details of their plans in order to conform to the government's preferences. Licensing officials and other regulatory agents can tell speakers exactly what they need to do to avoid the costs, delays, and stresses of litigation. In the setting of mass demonstrations, it may seem a triumph of social cooperation for speakers to alter their plans

marginally in order to accommodate the regulatory priorities of the state. If one thinks of film or book editing, however, the prospect of government prescribed alterations is a cause for concern. Whether the government dictates changes to speakers who have no real bargaining power, or negotiates for alterations in a spirit of give and take, the symbolic division of authority between the state and the individual is upset when the government so intrudes itself into the formulative stages of the communicative process.

Such prescriptive participation by government in the planning of speech activities can also occur under a regime of criminal sanctions whenever speakers establish informal contact with officials prior to the time of dissemination. Promises not to prosecute can be conditioned on alterations of content or form. Contact between speakers and officials prior to dissemination is far more common under licensing and injunctive systems, however, because their procedures necessarily bring speakers and regulatory agents together before the communicative event occurs. In the case of civil lawsuits, moreover, the government is hardly ever involved as an adversary party, so the phenomenon of official prescription of the details of communications is virtually nonexistent. Thus, the premise that government may properly participate on a regular basis in the formulation by private speakers of the details of their communications is implicit only in regimes that exhibit the feature of adjudication prior to initial dissemination.

It may be objected that so long as prospective speakers have no duty to bargain, so long as they can refuse to compromise the integrity of their communications and instead contest the government in court, the role of the state is not exalted nor that of the individual demeaned. Speakers tempted to bite at the apple of compromise are in no position to complain on libertarian grounds about the government's failure to protect them from their own lack of willpower. There are higher values in our constitutional system, however, than the avoidance of paternalism. Although a succession of individual speakers may freely accept the intrusion of government into the formulative stages of the communicative process, the collective effect of such a pattern of intervention can amount to a fundamental reallocation of roles in the direction of greater authority for the state and less authority for the individual. A regulatory system that promotes such a reallocation of roles can be thought to be based on unacceptable premises regarding the proper relationship between the state and the individual. That is true even

when the immediate actors in the regulatory drama remain insensitive to the dimension of role allocation, or cravenly choose to ignore it.

The government's ability under the prior regulatory regimes to affect the timing of speech also expands the role of the state in determining the details of communications by private parties. We have discussed how officially prescribed delay bears on self-censorship by speakers and the reception of communications by audiences.[138] Here the concern is not with behavioral effects but with what is implied about the division of authority between the state and the individual when private speakers are denied the right to communicate spontaneously, when they must speak only on the government's schedule. The delays inherent in the modern prior regulatory regimes are usually short and subject to constitutional limitation, but even short delays take from speakers the power to determine precisely when to disseminate their communications. When government possesses the power to delay communications that it cannot suppress, speakers cannot be said truly to control, in the sense required for autonomy, their own communicative endeavors. In this regard, the officially prescribed delays inherent in licensing and injunctive systems seem inconsistent with the premise of individual autonomy. The subsequent punishment regimes do not, in their normal operation, impose such delays.

The premise of individual autonomy may also be denied when speakers are treated by the regulatory process in an undignified manner. Respect as well as control is a central component of the notion of autonomy. In one regard, the prior regulatory regimes can be said to pay controversial speakers the highest respect—by taking them seriously. Licensing systems and injunctions are based on the premise that controversial speech sometimes needs to be prevented precisely because it matters, that unorthodox and dissident speakers are not, as Holmes implied, so ineffectual and pathetic that they can safely be ignored.[139] In other ways, however, the prior regulatory regimes might be thought to treat speakers with less than the full measure of respect required by the notion of individual autonomy.

It might be argued that licensing systems force speakers to assume the role of supplicants asking the government for per-

138. *See* section IV(B) *supra* at 30-33; section VII *supra* at 63-69.

139. *See* Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

mission to carry on their communicative endeavors. Even when that permission is promptly and cheerfully granted, the speakers may feel demeaned by the procedure. Milton's disdain for licensing stemmed in large part from this source of irritation.[140]

Under modern licensing systems, however, prospective speakers do not really ask permission. They assert claims of right. The procedures required by *Freedman v. Maryland* institutionalize the premise that obtaining a license is not a matter of grace but rather of entitlement.[141] There is nothing undignified about appearing before an adjudicative official or tribunal for the purpose of demanding one's due.

In order for the supplication argument to figure in the present analysis, moreover, it must be shown that injunctions also require speakers to assume the posture of supplicants. It is true that under the collateral bar rule enjoined speakers must go to court to vacate injunctions before they may proceed to speak. That requirement may be objectionable due to the delays and burden of initiative it imposes,[142] but can the act of appealing a judicial order really be characterized as an exercise in supplication? I think not, and therefore conclude that there is no denial of individual autonomy implicit in the fact that under licensing and injunctive systems speakers are routinely obligated to appear in court before embarking on their communicative ventures.

The disallowance of self-help, a feature shared by licensing systems and injunctions governed by the collateral bar rule, may be thought to deny the premise of individual autonomy in another way. Speakers at times will suffer punishment for engaging in acts of expression that are protected under substantive first amendment standards. Prosecution in situations covered by a collateral bar rule is for failure to follow prescribed procedures, not for any harm engendered by the expressive activity itself. There is a certain regimental quality about a doctrine that so exalts the government's procedures. One must also sympathize with the plight of the prosecuted speaker who has a good first amendment claim on the merits but can tell it only to the wind.

Of course, procedure—in the form of categorical, obligatory, sometimes harsh prescriptions of when and how—is the mortar

140. *See* text accompanying note 130 *supra*.
141. *See* text accompanying notes 66-69 *supra*.
142. *See* sections IV(A) & IV(B) *supra* at 28-33.

of the rule of law. Surely a first amendment concern for individual autonomy would not be grounds for suspending filing deadlines or waiver rules. There is a fine but essential line, however, between the ordering of adjudicative discourse and the imposition of behavioral standards on persons enmeshed in the legal process. When that line is crossed, individuals become the instruments rather than beneficiaries of the adjudicative machinery. Autonomy is then denied.

The collateral bar rule for injunctions serves an ordering function in some contexts. If special policing is needed for a mass demonstration, for instance, there is much to be said for requiring protestors to vindicate their constitutional rights in court, if at all possible, rather than in the streets. In most circumstances, however, no major ordering function is served by the disallowance of self-help. The collateral bar rule probably owes its existence to a desire to reinforce the mystique of injunctions, reflecting a philosophy of social control and a disregard for individual freedom that seems out of place as applied to expressive activity. In this regard, injunctive systems governed by the collateral bar rule fail to respect the autonomy of speakers.

Under a licensing system, speakers who proceed without a required permit can be punished for that act alone. They might have had a permit for the asking, but if they didn't ask they can be punished. No first amendment defense will be heard. Only if the speakers seek the permit, and also make some effort to achieve a judicial overruling of an administrative denial, may they engage in self-help.[143] However, the rule against self-help in the context of licensing systems seems hardly gratuitous, or even controversial. If speakers were free to ignore the permit requirement whenever they would be constitutionally entitled to obtain the permit, there would be little point in having a licensing system at all. Thus, insofar as a denial of autonomy depends on the overbearing character of the government's procedural prescriptions, the disallowance of self-help in the permit process does not seem objectionable. The insistence upon prescribed procedures which characterize the collateral bar rules that govern both licensing systems and injunctions does not, therefore, link the two regimes of prior regulation in the matter of premises.

I conclude that whenever they are employed in a routine and comprehensive fashion, licensing and injunctive systems

143. *See* note 71 *supra* and accompanying text.

share three implicit premises that are unacceptable in a constitutional order that is founded on the principle of limited government and hence committed to maintaining a balance of authority between the state and the individual. First, the widespread use of licensing or enjoining implies a premise of comparative distrust, a belief that it is more dangerous to trust audiences with controversial communications than it is to trust the legal process with the power to suppress speech. Second, the invocation of such extraordinary regulatory procedures as permit requirements and injunctions implies that the activity of disseminating controversial communications is abnormally hazardous or disruptive, and hence represents a threat to, rather than an integral feature of, the social order. Third, licensing systems and injunctions coerce or induce speakers to relinquish full control over the details and timing of their communications. These regulatory systems must be premised, therefore, on the notion that either such control is not an essential attribute of the autonomy of speakers, or that such autonomy need not be respected. Either premise is objectionable. The common feature of unacceptable premises constitutes a basis for a theory of prior restraint that is independent of the behavioral analysis undertaken in the preceding sections.

IX. THE RATIONALE FOR LINKAGE AND THE SIGNIFICANCE OF THE COLLATERAL BAR RULE

The preceding analysis has been confined to a comparison of regulatory methods assuming that the collateral bar rule governs injunctions. At present, the collateral rule is applied with sufficient regularity that it may properly be viewed as a defining characteristic of the injunctive procedure. Some commentators have suggested, however, that the collateral bar rule ought to be abandoned or severely restricted, at least for injunctions that regulate communication.[144] If that course is followed, certain of these commentators assert, the case for a presumption against regulating speech by injunction would no longer be compelling.[145] If that contention is true, the central linkage between licensing systems and injunctions that lies at the heart of modern prior restraint doctrine would be broken. We would be left perhaps with a presumption against licensing, but no theory supporting a broader doctrine of prior restraint.

144. *See* O. FISS, *supra* note 13, 68-74; Barnett, *supra* note 14, at 557; authorities cited in note 42, *supra*.

145. .*See* O. FISS, *supra* note 13, 68-74; Barnett, *supra* note 14, at 558..

It is necessary, therefore, to determine whether the arguments developed in this paper hold up when injunctions are assumed not to be governed by the collateral bar rule.

The self-censorship analysis developed above changes significantly if the collateral bar rule does not govern injunctions, but no different conclusion emerges from the altered analysis. It will be recalled that the burden of initiative and delay constituted the only two important sources of self-censorship under the prior regulatory regimes, and that those sources were judged not to cause as much self-censorship as the factors of uncertainty and the possibility of heavy sanctions that operate under the subsequent punishment regimes.[146] If enjoined speakers do not have to contend with the collateral bar rule, and thus can assert their constitutional rights by engaging in self-help, the burden of initiative and delay should cause no self-censorship whatever. Speakers need take no initiative regarding the legal process, and need not wait for anyone's permission.

On the other hand, the factors of personalization and expeditious enforcement, which were judged not to cause significant self-censorship when the collateral bar rule governs,[147] could be a source of self-censorship when self-help is permitted. Personalization gives speakers relatively precise information regarding what activities are prohibited, increases the likelihood of prosecution for violations, and contributes to the mystique of injunctions. Persons who know that their proposed activities are covered by the legal prohibition, and will lead to prosecution if undertaken, may be deterred on those accounts from pursuing their self-help remedy. Behind the decision to engage in self-help may often lie the hope that vindication in court will not be necessary. That hope can only be diminished by the phenomenon of personalization. This point has some force, but it is also likely that on occasion the personalized, adversary character of the proceedings at which injunctions are issued will heighten the first amendment consciousness and competitive spirit of speakers, emboldening them to pursue all available means of vindication, including self-help.

The mystique that surrounds injunctions traces in part to their personalized character,[148] and could be a factor that would deter some speakers from pursuing a self-help remedy. That mystique, however, may actually be a function of the col-

146. *See* sections IV(A) & IV(B) *supra* at 28-33; IV(F) *supra* at 47-48.
147. *See* sections IV(D) & IV(E) *supra* at 35-47.
148. *See* section IV(D) *supra* at 35-43.

lateral bar rule. Were self-help to be legitimated as a remedy for improper injunctions, no overtones of defiance would accompany the decision by a speaker to violate an injunction. If the phenomenon of mystique traces to basic notions of respect for law, it would seem that no mystique should inhibit persons from respectfully asserting their rights by means of the authorized remedy of self-help. In sum, the abandonment of the collateral bar rule for injunctions might increase to some extent the impact of personalization on self-censorship. There is no reason to suppose, however, that the increase would be dramatic.

The factor of expeditious enforcement would be a more important cause of self-censorship were the collateral bar rule not in operation. It seems logical that persons contemplating the violation of law are influenced in their behavioral calculations not only by the certainty and severity of sanctions, but also by the swiftness with which they are administered. So long as self-help is an unauthorized remedy, it should be of no concern in the self-censorship analysis whether speakers decide not to violate injunctions for fear of swift conviction and sanctions. When acts of expression in violation of injunctions become constitutionally protected, however, the deterrent effect of expeditious enforcement is a matter of first amendment concern. In this regard, the legitimation of self-help represented by the abandonment of the collateral bar rule would alter the analysis by redefining what counts as self-censorship.

On balance, injunctions not governed by the collateral bar rule could be expected to engender certain kinds of self-censorship on account of their distinctive features, but probably not significantly more self-censorship than was ascribed to injunctions and licensing systems in the preceding analysis. The increase in self-censorship due to personalization and expeditious enforcement under a regime in which self-help was authorized would seem to be offset by the elimination of self-censorship traceable to the burden of initiative and delay. Reversing the assumption regarding the collateral bar rule thus would not affect the conclusion that the self-censorship rationale for disfavoring prior restraints is unconvincing.

Under the analysis undertaken in this paper, a major element in the case for a presumption against prior restraint is the undesirably abstract quality of any adjudication that occurs prior to the time the communication at issue is initially disseminated to the public. If the collateral bar rule were no longer to

govern injunctions, adjudication of the first amendment claims of enjoined speakers would be of a less abstract character, but still somewhat problematic in this regard.

When self-help is a legitimate procedure for asserting rights, the issue in a prosecution for violating an injunction is whether the restraint on speaking was unconstitutional at the time it was imposed. That reasonable apprehensions which induced and justified the restraint in the first place failed to materialize does not impeach the state's case for regulation. If validity at the time of issuance is the question to be determined, adjudication of the constitutionality of injunctions remains somewhat abstract in character, even when the abandonment of the collateral bar rule permits constitutional claims to be raised in contempt proceedings. In theory, such factors as actual harm caused (or lack thereof), audience reception, *fait accompli* dynamics, and the lack of prospective accountability should not influence the constitutional judgments that are reached.

It is likely, however, that these moderating factors, which were determined in the preceding analysis to be salutary from the standpoint of first amendment theory,[149] will have some effect even when constitutional adjudication takes place at the contempt stage. For then the initial dissemination will have occurred. The judges will know what happened. The wisdom of hindsight is bound to play a role in their constitutional deliberations. If hindsight has an influence in this regard, injunctive systems not governed by the collateral bar rule may not differ significantly from the subsequent punishment regimes so far as the quality of constitutional adjudication is concerned. In fact, for most criminal prohibitions and civil liability rules, the actual consequences in particular cases are theoretically irrelevant to the constitutional validity of the prohibition on speaking. Hindsight enters the adjudicative process only by the back door. Holmes's test for criminal cases, it should be remembered, was clear and present *danger*, not harmful *results*.

There are, however, at least two reasons to believe that courts will be more influenced by hindsight, to the benefit of speakers, in the context of subsequent punishment adjudication than in contempt proceedings and the appeals that flow therefrom. First, in the case of injunctions there exists an antecedent constitutional judgment, uninfluenced by hindsight,

149. *See* section V *supra*.

geared to the details of the actual communication at issue, rendered at the issuance stage after full adversary argument. That judgment is bound to operate as a check on the subsequent use of hindsight, particularly at the contempt proceeding itself where the same judge who made the original constitutional determination is likely to be the decision maker. Even at the appellate stage, the original, pre-dissemination judgment regarding constitutionality is likely to exert a force. In the case of criminal prosecutions and civil lawsuits, in contrast, no constitutional judgment regarding the particular communication in dispute occurs until after the moment of initial dissemination. The first adjudicator to consider the case, as well as all those who come later, is subject to the salutary temptations of hindsight.

Second, even if the collateral bar rule is abandoned, courts have a powerful incentive to avoid letting events subsequent to dissemination of the communication in question influence their constitutional judgments at the contempt stage. If hindsight comes to play a major role in determining which injunctions are ruled invalid, rational speakers will always prefer to assert their rights by self-help, never by moving to vacate or modify the injunction prior to the time of dissemination. The judicial system cannot afford, on grounds both of equity and efficiency, to penalize speakers who pursue the more orderly anticipatory procedures for pressing their constitutional claims.

For these two reasons, courts are likely to be less influenced by events subsequent to dissemination when ruling upon self-help challenges to injunctions than in adjudicating criminal prosecutions and civil damage actions. If that is true, the considerations discussed in the preceding analysis that indicate that adjudication prior to initial dissemination tends to lead to more restrictive interpretations of the first amendment would operate to some extent even if the collateral bar rule were abandoned. Injunctions would still have in common with licensing systems a tendency to generate undesirably abstract constitutional judgments. A theory of prior restraint based on that tendency would retain validity.

Another major component of the case for linking injunctions with licensing systems is the tendency of both methods of regulation to be used more readily than methods that rely on subsequent punishment. Virtually every argument relating to overuse developed in the preceding analysis would remain applicable were the collateral bar rule no longer to govern injunc-

tions. A stroke of the pen by a single judge would still be sufficient to create the legal prohibition. The expeditious nature of the proceedings at which injunctions are issued would still encourage regulatory agents by holding out the prospect of almost instant gratification of the urge to prohibit speech. At the enforcement stage, moreover, the absence of the collateral bar rule would not affect most of the forces that encourage the prosecution of all violations. Disobedience of such a personalized prohibition would still be highly visible, and would often be viewed as a test of the judicial system's will. The prospect of expeditious conviction of offenders would continue to spur prosecutorial authorities into action.

The only real difference that abandonment of the collateral bar rule would make is that prosecutors would have to consider the possibility of a successful constitutional defense by speakers who violate injunctions. But since the regulatory forces will have already won the first constitutional skirmish (at the issuance stage), that possibility is not likely to have much effect on the decision whether to prosecute. For all intents and purposes, the overuse rationale against prior restraint remains fully intact when the assumption is shifted regarding whether injunctions are governed by the collateral bar rule. The overuse rationale, moreover, constitutes one of the most important components of the case for linking licensing systems and injunctions in a theory of prior restraint.

Somewhat less important in the overall scheme of the analysis is the factor of audience reception. It will be recalled that licensing systems and injunctions were found to distort the way audiences receive controversial communications in two ways: by delaying the moment of initial dissemination, and by officially characterizing communications at the time audiences receive them.

If the collateral bar rule were abandoned, distortion due to delay should not be a consideration. Speakers would regain complete control over the timing of their communications, and could choose the moments when audience reception was likely to be most favorable. The problem of the distorting filter—the labeling of communications before audiences can respond to them afresh—would remain, however. The costs, in terms of first amendment values, of this distorting filter are not sufficient in themselves to justify a presumption against licensing systems and injunctions; the delay factor represents the more serious cause of distortion of audience reception. Nonetheless,

at least something of the audience reception rationale survives the change of assumptions regarding the collateral bar rule. Moreover, since the dimension of audience reception is not a central consideration in the case for linking injunctions with licensing systems, the abandonment of the collateral bar rule would not seriously affect the theory of prior restraint developed in the body of this paper.

Finally, there is the matter of unacceptable premises. An important reason for disfavoring injunctions and licensing systems as methods of speech regulation is that they rest on three objectionable premises: (1) that speakers and audiences are to be trusted less than regulatory processes; (2) that the act of speaking is an abnormally hazardous activity that warrants special regulation; and (3) that the integrity of the communication or the autonomy of the speaker is not undermined when government plays a large role in determining the details and timing of a communication. Part of the argument against licensing systems and injunctions based on their unacceptable premises no longer would apply if the collateral bar rule were abandoned, but enough of the argument would remain intact to constitute at least a significant component of, if not an independently sufficient basis for, a theory of prior restraint.

No premise of comparative distrust is implicit in an injunctive system that is not governed by the collateral bar rule. Such a system is designed more to sanction speech than to suppress it. Audiences are trusted to receive communications that speakers believe will be ruled to be constitutionally protected. In cases of unusually strong favorable public response, the prosecutorial and adjudicative processes can even be influenced in the direction of condoning the speech, even though this development is not likely to occur with regularity. The legitimation of self-help makes all the difference in the world so far as the premise of distrust is concerned.

On the other hand, the abandonment of the collateral bar rule would seem not to alter the premise implicit in both licensing systems and injunctions that the dissemination of controversial communications is an abnormally hazardous and disruptive activity. Even when self-help is permitted as a remedy for challenging injunctions, the choice of the injunctive method of regulation represents a judgment that the activity in question requires special, personalized, swift control. The mobilization of judicial authority at the anticipatory stage has symbolic overtones. Since "irreparable harm" is the standard

for injunctions, moreover, frequent resort by officials to the injunctive method of regulation would necessarily be based on the premise that as a general matter controversial speech threatens rather than strengthens the social fabric.

With regard to the third of the unacceptable premises listed above, the abandonment of the collateral bar rule would significantly alter the analysis. If self-help were permitted, regulatory officials would have no control over the timing of communications and little leverage to force speakers to negotiate over other details. There might remain some incentives for speakers to alter their plans in order to win official favor, but one could not say that official participation in the planning of communications would be so prominent a feature of the system as to imply basic underlying premises that negate the autonomy of speakers.

Thus, only one of the unacceptable premises would remain were injunctions no longer to be governed by the collateral bar rule. But that premise—that speech is a particularly dangerous endeavor that warrants special regulatory treatment—is one that cannot be accepted in a constitutional regime built upon the distrust of government and the willing acceptance of social change.

In conclusion, licensing systems have in common with injunctive systems that permit self-help several distinctive features that might figure in a theory of prior restraint. The most important of these features are the adjudication of constitutional claims with little attention to the contributions of hindsight, a strong tendency to be used casually and comprehensively, and acceptance of the premise that speech is an abnormally dangerous social force. The argument for linking licensing systems with injunctions at the center of a theory of prior restraint does not depend on the continued applicability of the collateral bar rule. The case for linkage is persuasive in any event.

X. CONCLUSION

Under the assumption that the collateral bar rule governs injunctions, the case is convincing for linking together licensing systems and injunctions, and subjecting those methods of regulation to an adverse presumption designed to restrict their use to exceptional situations. Although there is no reason to believe that licensing and injunctive systems cause more self-censorship of constitutionally protected communications than

subsequent punishment regimes, the two principal methods of prior regulation should be disfavored because they both must rely upon adjudication in the abstract, they both encourage regulatory agents to overuse the power to regulate, and they both adversely affect audience reception of controversial messages. In addition, licensing and injunctive systems both embody, if only implicitly, certain unacceptable premises regarding the respective spheres of authority of the state and the individual citizen. Even if one does not assume that the collateral bar rule governs injunctions, several of these decisive objections remain valid. Once the focus is shifted away from self-censorship, convincing reasons can be found for analogizing the enjoining of a communication to the historically disfavored practice of licensing speech. The concept of prior restraint is coherent at the core.